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Case No. _____

IN THE
Supreme Court of the United States

October Term, 1991

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections, and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida

Petitioners,

v.

CARL JACKSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether review should be granted to allow this Court to decide the standard to be applied in determining the harmlessness of any violations of *Hitchcock v. Dugger,* 481 U.S. 393 (1987), a matter left unresolved in the original opinion and currently the source of irreconcilable conflict between the state and federal courts.

II. Whether the supervisory power of this court should be exercised to compel circuit court utilization of a consistent standard of appellate review which, in turn, does not conflict with the standard of review established by this court in *Anderson v. Bessemer City.*

III. Whether a federal court of appeals may apply a harsher, discriminatory, standard of review in habeas corpus appeals brought pursuant to 28 U.S.C. § 2254 than the deferential standard applied in habeas corpus actions brought pursuant to 28 U.S.C. § 2255.

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II. CERTIORARI SHOULD BE GRANTED PURSUANT TO THE SUPERVISORY POWER OF THIS COURT TO CREATE AND ENFORCE A CONSISTENT STANDARD OF APPELLATE REVIEW AND TO ENFORCE THE STANDARDS SET DOWN BY THIS COURT IN *ANDERSON V. BESSEMER CITY.*

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE RECURRING CONFLICT OVER WHETHER STATE COURT FINDINGS OF HARMLESS ERROR, REVIEWED FEDERALLY PURSUANT TO 28 U.S.C. § 2254, ARE ENTITLED TO THE SAME DEFERENCE AS FEDERAL DISTRICT

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CARL JACKSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioners, Harry K. Singletary and Robert A. Butterworth respectfully pray for issuance of a writ of certiorari to review the judgment and sentence of the Eleventh Circuit Court of Appeals entered in the above-referenced proceeding on April 29, 1991, in which both rehearing and rehearing *en banc* were denied on July 1, 1991.

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 931 F.2d 712 (11th Cir.1991).

Previous appellate opinions were reported as *Jackson v. State,* 359 So.2d 1190 (Fla.1978), *cert. denied, Jackson v. Florida,* 439 U.S. 1102 (1979); *Jackson v. State,* 437 So.2d

147 (Fla.1983), *cert. denied,* 465 U.S. 1013 (1984); *Jackson v. State,* 452 So.2d 533 (Fla.1984); *Jackson v. Dugger,* 529 So.2d 1081 (Fla.1988) and *Jackson v. Dugger,* 554 So.2d 1168 (Fla.1989), *cert. denied,* ___U.S.___, 110 S.Ct. 3294 (1990).

The decision of the United States District Court was pronounced orally and was not reported. A transcript of that decision has been appendixed hereto at (App __A__).

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on April 29, 1991, and rehearing was denied on July 1, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VIII of the Constitution of the United State provides, *inter alia,*

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Amendment X provides that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

On April 20, 1975, Carl Jackson robbed a convenience store. During the robbery he murdered the store clerk, Ann Butler, kidnapped a customer, Mary Price, and then murdered Mrs. Price to complete his escape. *See Jackson v. State,* 359 So.2d 1190 (Fla.1978).

Mr. Jackson was eventually convicted of robbery, kidnapping and two counts of first-degree murder. In sentencing Jackson to death,[1] the trial court found nothing to mitigate his sentence but found five aggravating factors under Section 921.141, Florida Statutes, to wit:

> (1) The murder of Ann Butler took place during a robbery.
> (2) The murder of Ann Butler was committed for pecuniary gain.
> (3) The murder of Mary Price was committed while Mr. Jackson was engaged in flight from the scene of the robbery.
> (4) The murder of Mary Price was committed during a kidnapping.
> (5) The two murders were committed to avoid lawful arrest.

The Florida Supreme Court struck the second aggravating factor as a "doubled" factor, but upheld the trial court's findings and sentence. *Jackson v. State,* 359 So.2d 1190 (Fla.1978), *cert. denied,* 439 U.S. 1102 (1979).

Jackson filed a motion for post-conviction relief in the state courts pursuant to Florida Rule of Criminal Procedure 3.850. Among the issues raised were claims of ineffective assistance of counsel and error under *Lockett v. Ohio,* 438 U.S. 586 (1978). Jackson was granted a full and fair

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1 The advisory jury recommended death by an 11-1 vote.

evidentiary hearing in the state court on the issue of counsel's competence, but the *Lockett* claim was denied on procedural grounds. *Jackson v. State,* 437 So.2d 147 (Fla.1983), *cert. denied,* 465 U.S. 1013 (1984). A successive "Rule 3.850 petition" and accompanying (state habeas corpus) petition were also denied. *Jackson v. State,* 452 So.2d 533 (Fla.1984).

The advent of *Hitchcock v. Dugger,* 481 U.S. 393 (1987) caused the federal district court to dismiss a "next friend" federal habeas corpus petition (filed on Jackson's behalf by Ella Mae Wilson) so that Jackson could exhaust any new state remedies.

Jackson returned to the Florida Supreme Court with a *Hitchcock* claim, but lost when the Florida Supreme Court, after careful review, deemed any error harmless. *Jackson v. Dugger,* 529 So.2d 1081 (Fla.1988).

Jackson filed a third successive habeas corpus petition in the Florida Supreme Court, raising *Booth v. Maryland,* 482 U.S. 496 (1987) and rearguing *Hitchcock, supra;* but his petition was summarily denied without opinion. *Jackson v. Dugger,* 554 So.2d 1168 (Fla.1989), *cert. denied,* ___U.S.___, 110 S.Ct. 3294 (1990).

Jackson returned to Federal Court with his *Hitchcock* claim and was denied relief. (See App. A).

Jackson appealed to the Eleventh Circuit Court of Appeals. That court declined to review the district court decision pursuant to the standards of *Anderson v. Bessemer City,* 470 U.S. 564 (1985) and refused to grant either deference or comity to the Supreme Court of Florida and

that court's finding of harmless error.[2] Employing only a partial review of the record facts, the Circuit Court conducted a *de novo* "harmless error" review and decided that Jackson was entitled to relief. *Jackson v. Dugger,* 931 F.2d (11th Cir.1991). This action followed the denial of rehearing.

It should be noted that the Florida Supreme Court and the United States District Court, in reviewing the entire record, relied upon record facts that were neither reviewed nor cited by the Eleventh Circuit; for example:

> (1) The Eleventh Circuit found that Jackson's eight years of military service should have been considered in mitigation. The other courts, however, looked beyond Jackson's mere enlistment and noted that Jackson's military "career" was a sordid parade of AWOL's, drug abuse and demotions which led to an involuntary, "general," discharge. (*See* TR 801, compare *Jackson v. State,* 529 So.2d 1081 (Fla.1989) and *Jackson v. Dugger,* 931 So.2d 712 (11th Cir.1991)
>
> (2) Jackson's defense attorney (at trial) testified (at the Rule 3.850 hearing) that Jackson's record was so bad that it would not have helped his case at all. (TR 801). The defendant was examined by a psychiatrist and a psychologist who agreed that Jackson was sane and competent during the crime. (R 460). Potential penalty phase witnesses questioned by counsel declined to get involved. (R 462-463).

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2 In fact, the Eleventh Circuit does not have an established or consistent standard of review. *Booker v. Dugger,* 922 F.2d 633 (11th Cir.1991); *Tafero v. Dugger,* 873 F.2d 249 (11th Cir.1989).

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO DECIDE THE STANDARD TO BE APPLIED IN DETERMINING THE HARMLESSNESS OF ANY VIOLATION OF *HITCHCOCK V. DUGGER*, 481 U.S. 393 (1987).

The constitutional application of federal (statutory) habeas corpus review under 28 U.S.C. § 2254 requires the federal courts to fairly and consistently apply reasonable standards of review. The statute, like any other, cannot be arbitrarily or capriciously applied. *Furman v. Georgia,* 408 U.S. 238 (1972).

In cases raising claims of harmless error under *Hitchcock v. Dugger,* 481 U.S. 393 (1987), no standard of "harmless error" review has been recognized to guide the federal courts during § 2254 proceedings. Although the Eleventh Circuit has acknowledged the existence of this problem, *see Tafero v. Dugger,* 873 F.2d 249 (11th Cir.1989), *cert. denied,* ___U.S.___, 110 S.Ct. 1834 (1990), it has undertaken no effort the resolve the problem. The result for the State of Florida has been an inconsistent patchwork of unpredictable and arbitrary remands for resentencing. In fourteen (14) Florida cases reviewed by the Eleventh Circuit, "harmless error" was found in three cases, *see Clark v. Dugger,* 834 F.2d 1561 (11th Cir.1987, *cert. denied,* 485 U.S. 982 (1988); *Tafero v. Dugger,* 873 F.2d 249 (11th Cir.1989), *cert. denied.,* ___U.S.___, 110 S.Ct. 1834 (1990); *Demps v. Dugger,* 874 F.2d 1385 (11th Cir.1989), *cert. denied,* ___U.S.___, 110 S.Ct. 1834 (1990). In other cases, the Eleventh Circuit rejected any claim of "harmless error" without discussion or analysis, *see Hargrave v. Dugger,* 832 F.2d 1528 (11th Cir.1987), *(en banc), cert. denied,* 489 U.S. 1071 (1989); *Messer v. Florida,* 834 F.2d 890 (11th Cir.1987); *Stone v. Dugger,* 837 F.2d 1447 (11th Cir.1988), *cert. denied,*

489 U.S. 1071 (1980); *Ruffin v. Dugger,* 848 F.2d 1512 (11th Cir.1988), *cert. denied,* 488 U.S. 1044 (1989); while in other cases some form of "harmless error" review was conducted. *Magill v. Dugger,* 824 F.2d 879 (11th Cir.1987); *Knight v. Dugger,* 863 F.2d 705 (11th Cir.1988); *Jones v. Dugger,* 867 F.2d 1277 (11th Cir.1989); *Delap v. Dugger,* 890 F.2d 1285 (11th Cir.1989); *Aldridge v. Dugger,* 925 F.2d 1320 (11th Cir.1991); *Jackson v. Dugger,* ___F.2d___ (11th Cir., April 29, 1991).

As a nation of laws rather than men, our justice system must have articulable standards applied consistently from case to case. The standard of review in a given case should depend on the law rather than the composition of a randomly selected judicial tribunal. In the Eleventh Circuit, however, some panels reject out of hand any inference that "Hitchcock" error can be harmless, *see, e.g. Knight,* 863 F.2d at 710, while other panels assess the relative strength of the aggravating and mitigating factors under Florida law. *See, Tafero, supra,* 873 F.2d 252, n.4.

This Court may use its certiorari power to resolve this major intracircuit conflict. C.F. *John Hancock Inc. Co. v. Bartels,* 308 U.S. 180, 181 (1939). The State of Florida is constitutionally entitled to federal habeas corpus review which is neither arbitrary nor capricious and which is predicated on fair, articulable standards. It is imperative, therefore, that certiorari be granted to resolve this problem.

This same issue is currently before the Court in *Singletary v. Booker,* Case No. 90-1778 and will appear in an anticipated certiorari petition from the decision in *Gore v. Dugger,* 933 F.2d 904 (11th Cir.1991). In *Gore,* the Eleventh Circuit panel conceded the differing approaches taken by various judges of the Court and then simply decided not to resolve the conflict, and just to automatically grant habeas corpus relief on nothing more than the presence of a

Lockett/Hitchcock error. Thus, again, the state has been subjected to arbitrary and capricious § 2254 review. This situation simply cannot be permitted to persist.

II. CERTIORARI SHOULD BE GRANTED PURSUANT TO THE SUPERVISORY POWER OF THIS COURT TO CREATE AND ENFORCE A CONSISTENT STANDARD OF APPELLATE REVIEW AND TO ENFORCE THE STANDARDS SET DOWN BY THIS COURT IN *ANDERSON V. BESSEMER CITY.*

The Eleventh Circuit refused to follow the standard of appellate review established by this Court in *Anderson v. Bessemer City,* 470 U.S. 564 (1985). Instead, the Court engaged in appellate trial *de novo* and, after reviewing only portions of the record and without reference to any evidence relied upon by the district court, granted relief. The Petitioner asks this Court, pursuant to its established supervisory jurisdiction, *McNabb v. United States,* 318 U.S. 332 (1942); *Marshall v. United States,* 360 U.S. 310 (1959); *United States v. Hasting,* 461 U.S. 499 (1983) to establish and/or enforce a meaningful and consistent rule of appellate review.

As the situation stands, the Petitioner has no assurance from one § 2254 appeal to the next how its cases will be reviewed. Sometimes, as here, all prior proceedings are dismissed as meaningless and the court conducts trial *de novo.* At other times, the court utilizes *Anderson, supra. See LoConte v. Dugger,* 847 F.2d 745 (11th Cir.1988). Other times, it proclaims the existence of a hybrid standard. *Bundy v. Dugger,* 850 F.2d 1402 (11th Cir.1988). The result is a jumbled, inconsistent and arbitrary standard of review. *Furman v. Georgia, supra.*

The case at bar is a pointed example of the problem. Here, the Florida Supreme Court made a "harmless error" determination based upon careful consideration of the entire record. The District Court, in its turn, did the same. At times, other panels of the Eleventh circuit have held that these determinations would be upheld unless clearly erroneous. *Agee v. White,* 809 F.2d 1487 (11th Cir.1987). Here, in a case where "harmless error" was found by applying facts to state, not federal, law, *Anderson* and *Agee* should have controlled. Instead, however, the Eleventh Circuit embarked upon trial *de novo* and, relying upon less than the full record, ordered resentencing simply to see if an advisory jury would change its mind if presented with new evidence.

We submit that the issue of "harmless error," like other so-called mixed issues of law and fact, should be resolved in a district court proceeding which serves as the "main event" rather than "round one." That is the rule of *Anderson, supra.* Once a case leaves the district court on appeal, the standard of review must uniformly change to one invoking the "clearly erroneous" standard of *Anderson.* If 2254 is to be applied constitutionally, the parties must have notice of the rules that will be applied and assurance that similar cases will be reviewed in a like manner. The current system cannot stand.

Certiorari should be granted and this case should be remanded to the circuit court with instructions to affirm the record-based decision of the district court.

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE RECURRING CONFLICT OVER WHETHER STATE COURT FINDINGS OF HARMLESS ERROR, REVIEWED FEDERALLY PURSUANT TO 28 U.S.C. § 2254, ARE ENTITLED TO THE SAME DEFERENCE AS FEDERAL DISTRICT COURT FINDINGS OF HARMLESS ERROR REVIEWED PURSUANT TO 28 U.S.C. § 2255 AND *LIPSCOMB V. UNITED STATES*, 468 U.S. 1321 (5TH CIR.1972).

The case at bar concerns the disparate standards of review, particularly on appeal, imposed in cases arising under 28 U.S.C. § 2254 and 28 U.S.C. § 2255.[3] Since the same standards are not employed, even in cases where the legal issues are virtually identical, basic constitutional guarantees of due process, equal justice, comity and federalism are being violated. From the standpoint of the states, criminal proceedings reviewed pursuant to 28 U.S.C.

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3 An inevitable consequence of litigation under 28 U.S.C. 2254 is friction between the states and the federal judiciary, a point noted in *Sumner v. Mata*, 449 U.S. 539 (1981). As noted in *Kelley v. Robinson*, 479 U.S. 36 (1986), the state's interests in the administration of their criminal justice systems are among the most powerful considerations reviewed in equitable proceedings. This Court has utilized certiorari review to take steps necessary to minimize that friction while upholding the constitutional rights of both the states and the individuals concerned. *Coleman v. Thompson*, ___U.S.___, 115 L.Ed.2d 640 (1991); *Marshall v. Lonberger*, 459 U.S. 422 (1983); *Rose v. Lundy*, 455 US 509 (1982). This petition presents a recurring issue which, to date, has evaded review while continuing to create friction. *Gerstein v. Pugh*, 420 U.S. 103 (1975). Thus, once again this Court is asked to intervene to minimize said friction and to protect the constitutional rights of the parties involved. *Sumner, supra.* In the process, the Petitioner would also invoke the supervisory powers of this Honorable Court. *McNabb v. United States*, 318 U.S. 332 (1942); *Marshall v. United States*, 360 U.S. 310 (1959); *United States v. Hasting*, 461 U.S. 499 (1983).

§ 2254 are given much harsher review than analogous federal prosecutions reviewed pursuant to § 2255. Thus, state judgements and sentences are subjected to reversals in cases where, had the same rulings been generated in the federal district courts, they would have been upheld. From the inmate's standpoint, any serious review of the petitioner's case "on the merits" will be controlled by the identity of the court being reviewed rather than the factual or legal issues involved. The net result is an arbitrary and capricious system of statutory collateral review which must be corrected. *Furman v. Georgia,* 408 U.S. 238 (1972).

Carl Jackson was sentenced to death in a (Florida) penalty-phase proceeding conducted in violation of the legal standards recognized in *Hitchcock v. Dugger,* 481 U.S. 393 (1987). The Florida Supreme Court, recognizing the existence of *Hitchcock* error, reviewed the nonstatutory mitigating evidence proffered by Mr. Jackson and found it to be so minimal as to render any error "harmless." As the final court in Florida's tripartite capital sentencing system, the Florida Supreme Court held that even with this "new" evidence Mr. Jackson would still be sentenced to death even *if* the advisory jury recommended a "life" sentence.

If the Florida Supreme Court had been a United States District Court, that finding would have essentially ended the inquiry, for if Mr. Jackson's case had gone on to the Eleventh Circuit under the auspices of § 2255 rather than § 2254, the "same sentence anyway" or "harmless error" finding would have been considered dispositive. *Russo v. United States,* 470 F.2d 1357 (5th Cir.1972); *Lipscomb v. United States,* 468 U.S. 1321 (5th Cir.1972); *Crovedi v. United States,* 517 F.2d 541 (7th Cir.1975); *Farrow v. United States,* 580 F.2d 1339 (9th Cir.1978); *Hampton v. United States,* 504 F.2d 600 (10th Cir.1974). Of course, Mr. Jackson did not proceed under § 2255. Instead, his remedy was to file on appeal arising under § 2254. As a result, Jackson enjoyed

complete *de novo* review, complete rejection of the comity and deference granted to the Florida Supreme Court by the district court, and an unwarranted grant of a new sentencing hearing based upon a decidedly incomplete review of the record by the circuit court, all in clear violation of the standards announced in *Sumner v. Mata, supra*.

Federal appellate courts, in § 2255 proceedings, defer to findings of harmless error entered by federal district courts for the reasons expressed in *Farrow v. United States,* 580 F.2d 1339, 1352-53 (9th Cir.1978), to wit:

> "Moreover, as the new Rules Governing Habeas Corpus Cases now make express, it is consistent with the federal habeas corpus procedure under § 2254 that "the district judge...employ a variety of measures in an effort to avoid the need for an evidentiary hearing. *Blackledge v. Allison,* 431 U.S. at 81...The § 2255 motion, which was designed to afford "the same rights in another, and more convenient forum," *United States v. Hagman,* 342 U.S. 205, 219...(1952) must be similarly construed; and, indeed, the procedural devices provided to make an evidentiary hearing unnecessary are nearly identical in the rules pursuant to § 2254 and § 2255 respectively.

Where the judge's own recollection enables him to answer in the negative the "real question" in *Tucker* cases - whether the original sentence might have been different if he had known the prior convictions were invalid under *Gideon* - an evidentiary hearing is unnecessary, and it is entirely

appropriate that the judge dismiss a § 2255 motion without necessitating the time and expense a hearing would entail.[4]

Of course, it is beyond dispute that the state courts are vested with the same duty to defend and uphold the constitution as the federal courts. *Duckworth v. Serrano,* 454 U.S. 1 (1981). It is also settled that state court findings of fact are entitled to deference in the federal courts. *Sumner, supra.* Finally, it is clear that federal habeas corpus review is to be limited, *Sumner, supra,* so that the federal courts do not sit as second-tier state appellate courts. *Pulley v. Harris,* 465 U.S. 37 (1984); *Wainwright v. Goode,* 464 U.S. 78 (1984).

In this regard, the concept of "exhaustion" was recognized in *Rose v. Lundy,* 455 U.S. 509 (1982) both out of respect for comity and recognition of the states' ability to abide by and uphold the constitution, given the chance to do so.

The Eleventh Circuit's refusal to grant any deference to the Florida Supreme Court's finding of harmless error not only offends these constitutional principles, it removes any incentive the state might otherwise have to provide inmates collateral review (at state rather than federal expense). If the findings of the state courts are meaningless, then, the procedures for arriving at them are, in turn, superfluous and, perhaps, avoidable by simply dropping them on the federal courts, at federal expense. These were the concerns addressed by this Court in *Rose v. Lundy, supra,* in

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4 The sentencing errors involved in *"Tucker"* cases (under 2255) and *"Hitchcock"* cases (under 2254) are analogous. Both classes of case involve constitutional sentencing errors based on the consideration of aggravating and mitigating evidence. To avoid the expense and burden of massive resentencings, the federal courts adopted the *"Lipscomb"* test. *See Lipscomb v. United States,* 468 U.S. 1321 (5th Cir.1972), relying upon federal trial judges to apply federal law in a collateral proceeding. Similar deference has not been extended to the state courts, although *Barclay v. Florida,* 463 U.S. 939 (1983) recognized that state court judges were capable of applying constitutional and state law relative to sentencing.

recognizing both the benefits of the exhaustion doctrine and the ability of the state courts to address even constitutional claims.

This argument does not suggest that the supremacy of the federal courts in resolving actual federal constitutional questions should be lessened or eliminated. In the case at bar, the state and federal courts were in complete accord on the "federal" issue. (*i.e.,* whether Jackson's constitutional right to have nonstatutory mitigating evidence considered was violated.)

The Eleventh Circuit observes that the application of evidence to state law is a federal question and that the Florida Supreme Court's resolution of the issue is neither binding nor relevant. The state submits that when, as here, the issue of "harmless error" devolves into an issue of how *state* law will be applied to *new evidence,* then the issue becomes one of state law entitled to the same deference as other state sentencing decisions, *see Gryger v. Burke,* 334 U.S. 728 (1948) and entitled, as well, to the same deference given the federal district courts under *Lipscomb.*

In *Marshall v. Lonberger,* 459 U.S. 422, 432 (1983), a similar distinction was recognized; to wit:

> "We entirely agree with the Court of Appeals for the Sixth Circuit that the governing standard as to whether a plea of guilty is voluntary for purposes of the Federal Constitution is a question of federal law....and not a question of fact subject to the requirements of 28 U.S.C. § 2254(d). But the questions of historical fact which have dogged this case from its inception...are obviously questions of 'fact' governed by § 2254(d)."

Again, the "federal question" in this case was the question of whether the sentencer considered nonstatutory mitigating evidence, not the impact of that evidence under state

law. Analogizing this case to *Lipscomb,* therefore, we find that the constitutional violation is a "given" fact and the only remaining issue is whether a new sentencing proceeding, conducted without constitutional error, would produce the same result.

The federal courts trust themselves to rule, under *Lipscomb,* that the time and expense of a new sentencing hearing need not be expended if the trial judge determines that he would impose the same sentence anyway. Thus, *Lipscomb* conserves limited judicial resources. That same level of trust, or of "deference," is not being extended to the state courts. There is no legal, historical or factual basis for this discrepancy. *Marshall, supra; Rose, supra.* Indeed, in *Coleman v. Thompson,* ___U.S.___, 115 L.Ed.2d 640, 670 (1991) this court underscored our position by holding:

> "We also eliminate the inconsistency between the respect federal courts show for state procedural rules and the respect they show for their own."

The Eleventh Circuit's refusal to respect the Florida Supreme Court's *"Lipscomb"* determination is a clear-cut illustration of the double-standard condemned in *Coleman.* The decision denies the states due process by employing arbitrary and capricious standards of review to § 2254 and § 2255 proceedings and it offends the concepts of comity and federalism.

CONCLUSION

It is suggested that special and important reasons exist for granting certiorari review.

Respectfully submitted,

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COUNSEL FOR PETITIONERS

Case No. _____

IN THE

Supreme Court of the United States

October Term, 1991

HARRY K. SINGLETARY, Secretary, Florida Department of Corrections, and

ROBERT A. BUTTERWORTH, Attorney General, State of Florida,

Petitioners,

v.

CARL JACKSON,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Carl JACKSON,
Petitioner-Appellant,

v.

Richard L. DUGGER, Secretary,
Florida Department of Corrections,
Respondent-Appellee.

No. 90-3237

United States Court of Appeals,
Eleventh Circuit.

April 29, 1991.

Following affirmance, 359 So.2d 1190, of convictions of robbery, kidnapping and two counts of first-degree murder and sentence of death, petitioner sought writ of habeas corpus. The United States District Court for the Northern District of Florida, No. 90-50069, C. Roger Vinson, J., denied relief and petitioner appealed. The Court of Appeals, Cox, Circuit Judge, held that: (1) petitioner was not denied effective assistance of counsel, and (2) trial court erred in instructing jury to consider only statutorily enumerated mitigating circumstances and in failing to consider nonstatutory mitigating circumstances.

Affirmed in part, reversed and remanded in part.

Appeal from the United States District Court for the Northern District of Florida.

Before JOHNSON, EDMONDSON and COX, Circuit Judges.

COX, Circuit Judge:

On April 20, 1975, Carl Jackson robbed a convenience store and murdered the clerk, Ann Butler. In the process of leaving, Jackson kidnapped Mary Price and later murdered her. He was convicted in a Florida Court of robbery, kidnapping and two counts of first-degree murder. He was sentenced to death for the murders. He ultimately attacked his convictions and death sentence by a 28 U.S.C. § 2254 petition filed in the Northern District of Florida. The district court denied relief and Jackson appeals. We affirm the district court's denial of relief as to Jackson's convictions, but reverse the district court's denial of relief relative to his death sentence.

I. FACTS AND PROCEDURAL HISTORY[1]

On the morning of April 20, 1975, Carl Jackson persuaded Jimmy Harris, a friend, to drive Jackson to a Jr. Food Store in Bay County, Florida. Once Jackson went into the store, Harris, not wanting to become further involved, drove away leaving Jackson stranded. Jackson proceeded to rob the store. During the robbery he shot and killed Ann Butler, the store clerk on duty. While Jackson was committing the robbery, Mr. and Mrs. Price, on their way to Sunday church services, stopped at the store. Mr. Price went into the store, leaving his car keys in the ignition and Mrs. Price in the car. Jackson, unseen by Mr. Price, exited the store and, realizing that Harris had ~~left him~~ stranded, commandeered the Prices' car with Mrs. Price in it. Mr. Price found the items he wanted and went to the counter to pay for them. At the

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1 This statement of the facts is based upon the Supreme Court of Florida's summary of the evidence at trial. *Jackson v. State,* 359 So.2d 1190 (Fla.1978), *cert. denied,* 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979).

counter he found Mrs. Butler lying on the floor dead. After calling the police Mr. Price noticed that Mrs. Price and the car were gone.

Jackson drove the Prices' car a short distance to a secluded area. Once there, he shot and killed Mrs. Price. Jackson then abandoned the car. Although there was no direct evidence that Jackson committed these acts, there was overwhelming circumstantial evidence including one of Jackson's fingerprints in the Prices' car, his bloody jacket near the car, and the testimony of Jimmy Harris.

After an investigation, Jackson was indicted and tried for the murders of Mrs. Butler and Mrs. Price, the kidnapping of Mrs. Price and the robbery of the Jr. Food Store. The jury found Jackson guilty on all four counts. A sentencing hearing was held to determine whether Jackson should be sentenced to death or life imprisonment for the murders.[2] Under Florida law, both aggravating and mitigating circumstances could be presented at the hearing. The State, relying on the evidence produced at trial to establish several aggravating circumstances, produced no additional evidence. The defense introduced the testimony of four witnesses. Part of that testimony indicated that Jackson had served eight years in the military, including three tours of combat duty in Vietnam.

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2 Jackson was sentenced to life imprisonment on the robbery charge and fifteen years imprisonment on the kidnapping charge.

The jury, by a vote of 11-1, recommended that Jackson be sentenced to death. The trial judge, after finding five aggravating[3] and no statutory mitigating circumstances, sentenced Jackson to death. Jackson appealed to the Supreme Court of Florida. The supreme court, after striking one of the aggravating circumstances,[4] affirmed his convictions and sentence, *Jackson v. State,* 359 So.2d 1190 (Fla.1978), *cert. denied,* 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979), and the United States Supreme Court denied certiorari. *Jackson v. Florida,* 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979).

Jackson then filed a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850. The trial court rejected all of Jackson's claims and the Supreme Court of Florida affirmed that ruling. *Jackson v. State,* 437 So.2d 147 (Fla.1983), *cert. denied,* 465 U.S. 1013, 104 S.Ct. 1016, 79 L.Ed.2d 246 (1984). After a death warrant was signed, Jackson filed a second Rule 3.850 motion. Additionally, Jackson filed a petition for a writ of habeas corpus in the Supreme Court of Florida. The trial court again rejected Jackson's Rule 3.850 claims. The supreme court affirmed the trial court's ruling and also denied Jackson's petition for habeas corpus relief. *Jackson v. State,* 452 So.2d 533 (Fla.1984).

In June 1984, Ella Mae Wilson filed, on Jackson's behalf, a "next friend" petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court, after initially staying the petition, dismissed it without prejudice to allow Jackson

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3 The five aggravating circumstances found by the court were: (1) the murder of Ann Butler was committed during the course of a robbery; (2) the murder of Ann Butler was committed for pecuniary gain; (3) the murder of Mary Price was committed while Jackson was fleeing after the robbery; (4) the murder of Mary Price was committed during a kidnapping; and (5) the two murders were committed to avoid a lawful arrest.

4 The aggravating circumstance struck by the supreme court was that the murder of Mrs. Butler was committed for pecuniary gain.

to exhaust his state remedies regarding the claim that his sentencing hearing violated *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

Thereafter, Jackson filed a second petition for a writ of habeas corpus in the Supreme Court of Florida alleging that his sentencing hearing violated *Hitchcock.* The supreme court determined that Jackson's sentencing hearing violated *Hitchcock* because the trial court's instructions precluded the jury from considering nonstatutory mitigating circumstances in determining Jackson's sentence. The court, however, concluded that any error that resulted from such a violation was harmless beyond a reasonable doubt because the nonstatutory mitigating evidence was "minimal." *Jackson v. Dugger,* 529 So.2d 1081, 1082 (Fla.1988).

In July 1989, Jackson filed a third petition for a writ of habeas corpus in the Supreme Court of Florida alleging five claims. The supreme court denied the petition without opinion. *Jackson v. Dugger,* 554 So.2d 1168 (Fla.1989), *cert. denied,* ___U.S.___, 110 S.Ct. 3294, 111 L.Ed.2d 803 (1990).

Jackson then filed this petition for a writ of habeas corpus in the Northern District of Florida alleging seventeen

claims.[5] The district court determined that Jackson's sentencing was in violation of the principle announced in *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). The district court considered the harmless error issue a "very close question," but concluded that the *Hitchcock* violation was harmless beyond a reasonable doubt. (R.4-5). The court then determined that none of the remaining claims were "sufficiently meritorious to warrant issuance of the writ." *Id.* The court, however, issued a certificate of probable cause to appeal, specifically focusing

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5 Jackson's petition raised seventeen claims. We will number the claims as did Jackson's petition. Six of Jackson's claims sought to overturn his convictions: (7) a claim that he received ineffective assistance of counsel during the guilt/innocence phase of his trial; (8) a claim that he received ineffective assistance of counsel on direct appeal; (14) a claim that jurors were dismissed in violation of the principles announced in *Witherspoon v. Illinois;* (15) a claim of improper argument by the prosecution during the guilt phase of the trial; (16) a claim that admission of testimony to the effect that Jackson requested an attorney during a custodial interrogation, and the prosecutor's comment on Jackson being provided an attorney after his arrest, violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments; and (17) a claim that photographic evidence was improperly admitted at trial.

The remaining eleven of Jackson's claims challenged his death sentence: (1) a claim that he was sentenced in violation of the principle stated in *Hitchcock v. Dugger;* (2) a claim that there was an improper argument by the prosecutor during the sentencing phase of the trial which created a "presumption of death"; (3) a *Booth v. Maryland* claim; (4) a claim that the trial court erred by not finding the mitigating circumstance of "no significant criminal history"; (5) a claim that he received ineffective assistance of counsel during the sentencing phase of the trial; (6) a second *Hitchcock v. Dugger* claim (*Hitchcock* error restricted defense counsel's efforts); (9) a claim that the trial court failed to provide a factual basis for imposition of the death penalty; (10) a claim that the Supreme Court of Florida erred by not ordering a new sentencing hearing after striking one aggravating circumstance; (11) a claim that the trial court misapplied (doubled) aggravating circumstances in sentencing Jackson; (12) a claim that the avoiding arrest aggravating circumstance was misapplied; and (13) a claim that the jury was misinstructed on the number of votes required to recommend life imprisonment.

on the claim that Jackson's sentencing hearing violated *Hitchcock*. Jackson now appeals the district court's denial of relief on eight of his seventeen claims.[6]

II. DISCUSSION

A. Claims Relating to Conviction

Jackson appeals the denial of relief on only one claim that relates to his convictions. It is the claim that he was denied effective assistance of counsel on direct appeal in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Claims of ineffective assistance of counsel are governed by the standard announced in *Strickland v. Washington,* 446 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "First, the defendant must show that counsel's performance was deficient.... Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687, 104 S.Ct. at 2064. The defendant must satisfy both parts of this standard to be entitled to relief.

Jackson argues that his appellate counsel was deficient in failing to raise two issues on direct appeal that would have resulted in the reversal of his convictions. First, he argues that his appellate counsel was deficient in failing to assert on direct appeal that potential jurors were dismissed by the trial court in violation of the principle announced in *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). When presented with an identical claim, the Supreme Court of Florida found that this issue was not preserved for appellate review because no objection

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6 Jackson appeals the district court's denial of relief on only one claim that relates to his convictions—claim (8). He also appeals the denial of relief on seven claims that challenge his death sentence: claims (1),(2),(3),(5),(9), (10) and (12).

to dismissal of these jurors was asserted in the trial court. *Jackson v. State,* 452 So.2d 533, 536 (Fla.1984).

[1,2] Jackson also argues that appellate counsel was deficient in failing to assign as error prejudicial closing arguments made by the State during the guilt/innocence phase of the trial. The record in this case does not include a transcript of the guilt/innocence phase of the trial, but Jackson's petition includes excerpts from the transcript which set forth the arguments complained of. These excerpts do not reflect any objection on the part of trial counsel to the arguments in question. Additionally, Jackson, in another part of his petition, specifically asserts that counsel failed to object to these arguments. R.1-4-157, 158. Under Florida law, failure to assert appropriate objections at trial bars review on appeal.[7] *Wilson v. State,* 436 So.2d 908, 910 (Fla.1983); *State v. Cumbie,* 380 So.2d 1031, 1033 (Fla.1980); *Clark v. State,* 363 So.2d 331, 333 (Fla. 1978).

Since the matters complained of in this case were not preserved for review on appeal, appellate counsel was procedurally barred from raising them on direct appeal and therefore was not deficient in failing to attempt to do so. *Bertolotti v. Dugger,* 883 F.2d 1503, 1523 (11th Cir.1989), *cert. denied,* ___U.S.___, 110 S.Ct. 3296, 111 L.Ed.2d 804 (1990). Because Jackson has failed to show that appellate counsel was deficient, the district court properly denied relief on the claim that he received ineffective assistance of counsel on direct appeal.

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7 The general rule under Florida law is that failure of trial counsel to object at trial bars appellate review. The sole exception to this rule is when the error constitutes "fundamental error." *Clark v. State,* 363 So.2d 331, 333 (Fla.1978). Jackson does not either in his petition or brief on appeal contend that the arguments complained of presented "fundamental error."

B. Claims Relating to Sentence
i. *Hitchcock* Claim

[3] Jackson contends that his sentencing hearing violated *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), because the jury was instructed to consider only statutorily enumerated mitigating circumstances and because the judge did not consider nonstatutory mitigating circumstances in sentencing Jackson to death. In *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), the Supreme Court held that an advisory jury may not be prohibited from considering relevant nonstatutory mitigating circumstances in making its sentencing recommendation and that the judge must consider relevant nonstatutory mitigating circumstances in determining an appropriate sentence. *Id.* at 398-99, 107 S.Ct. at 1824. The Court concluded that a jury's and judge's failure to consider such mitigating evidence violates the principles announced in *Skipper v. South Carolina,* 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)(plurality opinion). *Id.*

In this case, the State of Florida concedes, and both the Supreme Court of Florida and the district court found, that Jackson's sentencing hearing violated *Hitchcock.* The trial court's jury instructions were almost identical to those given in *Hitchcock.*[8] We conclude that the jury, in violation of

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8 In *Hitchcock,* the trial judge instructed the jury that "[t]he mitigating circumstances which you may consider shall be the following...." The court then read the statutory mitigating factors set out in Fla.Stat. 921.141(6). *See Hitchcock,* 481 U.S. at 398, 107 S.Ct. at 1824. The trial court at Jackson's sentencing hearing instructed the jury "[t]he mitigating circumstances which you may consider, if established by the evidence, are these: [Listing statutory mitigating factors]." Transcript of sentencing hearing at 795-96.

Hitchcock, was not permitted to consider mitigating circumstances in making its recommendation.

We also conclude that the trial judge did not consider nonstatutory mitigating circumstances in sentencing Jackson. In support of this conclusion we note that the trial judge instructed the jury only to consider statutory mitigating circumstances. A trial court is presumed to follow the instructions given to the jury. *See Daugherty v. Dugger,* 839 F.2d 1426 (11th Cir.), *cert. denied,* 488 U.S. 871, 109 S.Ct. 187, 102 L.Ed.2d 156 (1988); *Ziegler v. Dugger,* 524 So.2d 419 (Fla.1988). Additionally, the trial court's sentencing order referred to "insufficient mitigating circumstances as enumerated in Subsection (7) of said Section 921.141...." R.S. 13. This was almost identical to the sentencing order in *Hitchcock. See Hitchcock,* 481 U.S. at 398, 107 S.Ct. at 1824. The sentencing order does not mention nonstatutory mitigating circumstances. Furthermore there were no on-the-record statements by the trial judge indicating that he would consider nonstatutory circumstances. These factors support our conclusion that the trial judge did not consider nonstatutory mitigating circumstances, in violation of *Hitchcock.*

[4] Although we conclude that a *Hitchcock* violation occurred, that does not automatically require a reversal of Jackson's sentence. If the *Hitchcock* error is harmless beyond a reasonable doubt, then Jackson's sentence need not be reversed. *See, e.g., Demps v. Dugger,* 874 F.2d 1385 (11th Cir.1989), *cert. denied,* ___U.S.___, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990); *Clark v. Dugger,* 834 F.2d 1561 (11th Cir.1987), *cert. denied,* 485 U.S. 982, 108 S.Ct. 1282, 99 L.Ed.2d 493 (1988). A *Hitchcock* violation is harmless error if the court can conclude beyond a reasonable doubt that the nonstatutory mitigating evidence regarding the defendant's character that was not considered by the jury would not have influenced the jury to recommend a life sentence. *See*

Demps v. Dugger, 874 F.2d 1385, 1390 (11th Cir.1989), *cert. denied,* ___U.S.___, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990). Nonstatutory mitigating evidence not considered by the jury affects the jury's recommendation if it amounts to a significant mitigating circumstance. *See Delap v. Dugger,* 890 F.2d 285, 306 n. 23 (11th Cir.1989)("The presence of substantial nonstatutory mitigating evidence in this case...is sufficient to render the *Hitchcock* error not harmless beyond a reasonable doubt"), *cert. denied,* ___U.S.___, 110 S.Ct. 2628, 110 L.Ed.2d 648 (1990); *Tafero v. Dugger,* 873 F.2d 249, 252 n. 4 (11th Cir.1989)(per curiam)(error harmless where "[t]he factors presented by Tafero contain little mitigating value."), *cert. denied,* ___U.S.___, 110 S.Ct. 1834, 108 L.Ed.2d 962 (1990); *Jones v. Dugger,* 867 F.2d 1277, 1279 (11th Cir.1989)("resentencing is not required where the nonstatutory mitigating evidence presented was so insignificant....").

The State of Florida concedes that nonstatutory mitigating evidence was presented to the jury but maintains that this mitigating evidence was so insignificant that even if the jury could have considered it, they would not have been affected by it and the sentence recommendation would have been the same. Therefore, the State argues, the *Hitchcock* error was harmless beyond a reasonable doubt. This was the position taken by the Supreme Court of Florida when it reviewed Jackson's *Hitchcock* claim. *See Jackson v. Dugger,* 529 So.2d 1081, 1082 (Fla.1988). The court stated that "[v]iewed in its best light, the nonstatutory mitigating evidence was minimal. We are convinced beyond a reasonable doubt that even with the proper jury instruction, the jury would not have made a recommendation of life imprisonment for this double murder." *Id.*

[5] The State of Florida argues that this court is bound by the supreme court's determination that the error was harmless. We reject that argument. "The ultimate determination

of whether federal constitutional error is harmless is a federal question" and therefore federal courts are not bound by state court determinations of what constitutes harmless error. *Grizzell v. Wainwright,* 692 F.2d 722, 725 (11th Cir.1982), *cert. denied,* 461 U.S. 948, 103 S.Ct. 2129, 77 L.Ed.2d 1307 (1983). *See also Booker v. Dugger,* 922 F.2d 633, 636 n. 4 (11th Cir.1991).

[6] Jackson asserts that he produced significant evidence of nonstatutory mitigating circumstances. He points to evidence that he had served in the military for eight years; he served overseas, including three tours of combat duty in Vietnam; he was wounded in the chest while in Vietnam; he was a religious person; he had no history of prior violence; he had attempted to go to college; and he was amenable to incarceration. After reviewing the transcript of the sentencing hearing, we conclude that Jackson's military service is a significant nonstatutory mitigating circumstance that the jury was not allowed to consider. A psychologist, who interviewed Jackson, testified that, "I believe he [Jackson] told me he was in the army for eight years.... He said that he was in Vietnam three times and on each of those occasions he was in a combat situation for [a] fairly lengthy period of time." Sentencing Transcript at 741-42.

We believe that Jackson's military service is in and of itself a significant mitigating circumstance. We therefore need not decide whether the other evidence presented by Jackson was significant. The State argues that combat military service alone is not a significant mitigating circumstance and relies on this court's opinion in *Demps v. Dugger,* 874 F.2d 1385 (11th Cir.1989), *cert. denied,* ___U.S.___, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990), to support that position. In *Demps,* the petitioner alleged that he had produced evidence of military combat duty and argued that this would have influenced the jury to recommend life instead of death. In rejecting that argument, this court stated "that the record

reflects no evidence indicating any overseas combat experience." *Id.* at 1390. Thus, the *Demps* court concluded that Demps had failed to produce any nonstatutory significant mitigating evidence rather than that military combat service is not a significant mitigating circumstance.

We conclude that Jackson presented significant nonstatutory mitigating evidence that was not considered by the jury or judge because of the *Hitchcock* violation. We do not hold that military service, regardless of type and duration, is a significant nonstatutory mitigating circumstance. We do hold that Jackson's military service, as reflected by the record in this case, is significant. We cannot say beyond a reasonable doubt that this mitigating evidence would not have affected the jury's recommendation. Jackson's military service is a significant circumstance on which reasonable jurors could base a decision to recommend life imprisonment instead of death. We will not speculate about the actual effect of such evidence on a judge or jury. The district court erred by concluding that the error was harmless and by denying relief regarding Jackson's sentence.

ii. Other Claims Relating to Sentence

Jackson also appeals the denial of relief on six other claims that challenge his death sentence. Because we hold that he is entitled to a new sentencing hearing, we do not address these claims.

III. CONCLUSION

We AFFIRM the district court's order denying relief regarding Jackson's convictions. We conclude that Jackson's sentencing hearing violated *Hitchcock v. Dugger* and that the error was not harmless beyond a reasonable doubt. We

therefore REVERSE the district court's order denying relief regarding Jackson's sentence and REMAND to the district court with instructions to enter an order granting the petition for a writ of habeas corpus unless the State of Florida, within a reasonable time, either: (a) affords Jackson a new sentencing hearing and resentences Jackson in a proceeding that is consistent with the requirements of *Hitchcock;* or (b) vacates the death sentence and imposes a lesser sentence consistent with law.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Carl JACKSON, Appellant,

v.

STATE of Florida, Appellee.

No. 48165.

Supreme Court of Florida

March 9, 1978.

Rehearing Denied July 13, 1978.

Defendant was convicted by a jury in the Circuit Court, Bay County, Mercer P. Spear, J., of robbery, kidnapping, and two counts of first-degree murder and was sentenced to death. Defendant appealed. The Supreme Court held that: (1) trial court did not abuse its discretion in denying defendant's motion for change of venue; (2) death penalty statute is constitutional; (3) three photographs of victims were admissable, even though gruesome, inasmuch as such photographs were relevant; (4) sheriff's statement on cross-examination by defense counsel that defendant had stated that he wanted a lawyer after he was advised of his *Miranda* rights and was warned that he was going to be asked questions regarding two murdered women was admissable; (5) defendant by voluntary seeking out law enforcement officer to make a statement after being fully advised of his rights on two occasions thereby waived protection afforded by *Miranda* with result that such statement was admissable, and (6) where there was a doubling up of aggravating circumstances but no mitigating circumstances, death sentence was upheld.

Judgement affirmed and death sentence upheld.

Hatchett, J., concurred specially with an opinion.

Boyd, J., concurred in part and dissented in part with an opinion.

Louis G. Carres, Asst. Public Defender, Tallahassee, for appellant.

Robert L. Shevin, Atty. Gen., and Richard W. Prospect, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

Appellant, Carl Jackson, was convicted on two counts of murder in the first degree.[1] The jury recommended and the trial judge imposed a sentence of death. Jurisdiction vests in this court pursuant to Article V, Section 3(b)(1), Florida Constitution. We affirm the conviction and sentence.

On Sunday morning, April 20, 1975, Ann Patterson Butler was found shot in the head behind the counter of the Jr. Food Store in Bay County, Florida. A short time later, the corpse of Mary Frances Price was found in the front seat of a Chrysler automobile parked in a cemetery a short distance away. There were no witnesses to the actual killings. The following facts were adduced at trial:

On the morning of April 20, 1975, Jimmy Harris, an acquaintance of Jackson's, stopped by appellant's apartment to collect a debt. Appellant asked Harris to drive him to a friend's house to pick up the money. Instead of directing Harris to the other person's house, however, Jackson with a gun in his belt, told Harris to stop at a Jr. Food Store. He then got out of the car and ordered Harris to drive around

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1 Appellant was also convicted of robbery and kidnapping for which he received the following sentences: life imprisonment on the robbery charge and 15 years on the kidnapping charge.

the block, return, and pick him up. Harris drove away but did not return. Later that day, after hearing that the Jr. Food Store had been robbed, Harris went to the police and related the above information concerning appellant's earlier activities.

That same morning, Mr. and Mrs. Price stopped at the Jr. Food Store on their way to church. Mrs. Price waited in the car while Mr. Price went into the store. The keys to the car remained in the ignition. When Mr. Price entered the store, he turned left, away from the counter, and walked to the far corner of the building. After finding the item he wished to purchase, he approached the counter where he found Mrs. Butler, the sales clerk, lying on the floor in a pool of blood. He immediately telephoned the police and then looked out the front door and discovered that his wife and his car were missing. Both were found in a cemetery a few blocks away from the Jr. Food Store. Mrs. Price had been shot in the head at close range.

During the course of the investigation, appellant's jacket was discovered in the woods a few feet from the abandoned car. His girlfriend testified that he was wearing the jacket when he left their apartment on Sunday morning and returned later that day without it. Another witness testified that shortly after the robbery had taken place he saw appellant in the vicinity walking along the road and stopped to offer him a ride. Once inside the vehicle, appellant asked the witness if he had heard about the murder in the cemetery. Mrs. Price had not at this time been found. In addition, appellant's fingerprints were found on a package of cigarettes in the front seat of the Prices' car.

The evidence against appellant, though circumstantial, was strong.

[1,2] Appellant raises five points on appeal. First, he argues that the trial court erred in denying his motion for

change of venue. It is his contention that, due to pretrial publicity, it was impossible for him to receive a fair and impartial trial in Bay County. Twenty-two of the prospective jurors examined admitted to having read about the case or having heard about it on the radio or television. Nine prospective jurors knew one of the victims or knew one or more of the witnesses who would testify at trial. This issue is governed by the test stated in *Kelley v. State,* 212 So.2d 27 (Fla.2d DCA 1968), which we adopted in *McCaskill v. State,* 344 So.2d 1276, Opinion filed April 7, 1977:

> Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom. *Singer v. State* (Fla.1959) 109 So.2d 7; *Collins v. State* (Fla.App.1967) 197 So.2d 574, and cases cited therein. *Kelley v. State,* 212 So.2d at 28.

The prospective jurors, when questioned, stated that they could decide the issues between the state and the appellant based upon the evidence heard and the exhibits examined in the courtroom. We find nothing in the record to indicate that the trial judge abused his discretion in denying appellant's motion for change of venue.

[3] In appellant's second point he attacks the constitutionality of Florida's death penalty. Similar attacks were rejected by this court in *State v. Dixon,* 283 So.2d 1 (Fla.1973), and by the United States Supreme Court in *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). These cases are dispositive of this issue.

[4-6] Appellant's third point involves the admission into evidence of three photographs taken of the victims and admitted over appellant's objections. It is appellant's contention that these pictures were unnecessary and served only to inflame the passions of the jury. Indeed, the pictures complained of are gruesome. However, as we stated in *Young v. State,* 234 So.2d 341 (Fla.1970):

> The fact that the photographs are offensive to our senses and might tend to inflame the jury is insufficient by itself to constitute reversible error, but the admission of such photographs...must have some relevancy, either independently or as corroborative of other evidence. (footnotes omitted)

And again, in *State v. Wright,* 265 So.2d 361 (Fla.1972):

> [T]he current position of this court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in a case. Relevancy is to be determined in the normal manner, that is, without regard to any special characterization of the proffered evidence. Under this conception, the issues of "whether cumulative", or "whether photographed away from the scene," are routine issues basic to a determination of relevancy, and not issues arising from any "exceptional nature" of the proffered evidence.

See also *Bauldree v. State,* 284 So.2d 196 (Fla.1973), and *Swan v. State,* 322 So.2d 485 (Fla.1975). Applying this test of admissibility to this case, we hold that the photographs were relevant and that no error was committed in admitting them into evidence. However, we again caution the prosecutors of this state that gory and gruesome photographs admitted primarily to inflame the jury will result in a reversal of the conviction.

[7-9] Appellant also challenges the admission of certain statements elicited at trial regarding the exercise of his *Miranda* rights. The Bay County Sheriff was sworn as a witness for the state and related the following facts: Upon arrest, appellant was advised of his constitutional rights pursuant to the procedure outlined in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), after which he discussed his whereabouts on the morning of the murders and described the clothing he was wearing on that date. The sheriff then warned Jackson that he was going to ask him questions regarding the two women who were murdered, whereupon the defendant stated, "I want a lawyer." It is appellant's contention that the sheriff's statement constitutes an impermissible comment upon appellant's exercise of his rights under the Fifth and Sixth Amendments to the United States Constitution. Appellant correctly states our holding in *Bennett v. State,* 316 So.2d 41 (Fla.1975), that any comment upon a defendant's standing mute or silent or refusing to testify in the face of an accusation is fundamental error requiring reversal for a new trial. But this is not a Bennett situation. In *Bennett* the prosecutor elicited testimony from his own witness to the effect that after being advised of his constitutional rights, defendant "refused to sign the waiver...." This statement suggests that defendant had a duty to respond and was held to be an impermissible comment on defendant's exercise of his Fifth Amendment rights. In the present case, the appellant's statement, "I want a lawyer" was brought out on cross-examination by counsel for the defense.[2] But for the insistence

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2 Q All right, Sheriff, at this point did you show the defendant, this defendant, Carl Jackson, this is the defendant that you were talking to, right here? (Indicating.)

A Yes, sir.

Q Did you show Carl Jackson anything?

A Yes, sir.

of appellant himself, the fact would not have come before the jury. Appellant cannot initiate error and then seek reversal based on that error. *Gagnon v. State,* 212 So.2d 337 (Fla.3d DCA 1968); *Borst v. Gale,* 99 Fla. 376, 126 So. 290 (1930).

Q All right, I show you State's Exhibit Number One for Identification and ask you if you can identify that?

A Yes, sir, this is a brown jacket which I took out of a bag and handed it toward Carl Jackson, and he said—I said, "Is this your jacket?" And he said, "That's my jacket."

Q If the Court please, we move to introduce the jacket as State's Exhibit Number One for Identification into evidence.

THE COURT: Do you desire to cross examine the witness?

MRS. COSTELLO: One moment, Your Honor.

THE COURT: Well, the Court will withhold ruling until the defendant has had the opportunity to cross examine the witness.

MR. JONES: You may inquire.

CROSS EXAMINATION BY MRS. COSTELLO:

Q How do you know this is the jacket that you showed Carl Jackson?

THE WITNESS:

A I initialed it, and the date, right here. Here are my initials and the date. (Indicating.)

Q Okay, and you put those on at that time?

A Yes, Ma'am.

Q Mr. Jackson said that was his jacket?

A Yes Ma'am.

Q He had previously denied having a jacket, is that correct?

A Yes.

Q That was not in question and answer form, was it?

A Repeat that, please, Ma'am.

Q Sheriff, you just read the statement to the jury you say you took from Mr. Jackson. They were in question and answer form, is that correct?

A Yes.

Q An in that statement Mr. Jackson denied having a jacket, is that correct?

A There's two situations. He said he was wearing a jacket on one question in this statement, and then another one he said he wasn't wearing a jacket.

Q All right. Why wasn't this oral statement taken down and recorded by the stenographer?

A It was.

Q Not in question and answer form, was it?

[10] Later that evening, after appellant had informed the sheriff that he wished to speak to a lawyer, but before a lawyer was summoned, appellant asked to speak to the chief investigator concerning the charges against him. At this time, appellant was again advised of his rights, whereupon he proceeded to make a statement. Although appellant denied any involvement in the murders for which he was

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A This—

Q The part where you say he admits that's his jacket, that particular jacket?

A I see what you're getting at. When I asked—he answered the question, "Why are you trying to say something?" And the question, it wasn't really a question, it was a statement, "I want to talk to you about those two women that were murdered."

Q At that point, that was the period where the stenographer stopped taking down questions and answers in that form, is that correct?

A Right. I reached down, there was a bag sitting at my feet, between Mr. Jackson and myself. I reached down and pulled this jacket out of the bag and handed it toward him, unfolded it, and said, "Is this your jacket?"

Q I understand that was your statement.

MR. JONES: Let the sheriff finish his explanation.

MRS. COSTELLO: I don't think he's responding to the question.

THE COURT: Go ahead and proceed.

THE WITNESS:

A What do you want me to do now?

(Laughter.)

THE COURT: Ladies and gentlemen, we are very happy to have all of you here in court. You have a perfect legal right to be here. We want you here to see your court in operation. A man is on trial for his life here today. This is a very serious matter. There's nothing funny about it. Now, this is several times that we've had to have order in the courtroom. We do not wish to clear the courtroom. We wish to have you here so that you may see your court in operation. But, you must realize this. You must conduct yourselves accordingly. You may proceed.

MRS. COSTELLO: Thank you, your Honor. Sheriff, I would just like for you to explain why the form that you had previously followed, asking questions and receiving responses that were recorded by the stenographer, why that was stopped.

THE WITNESS:

A The statement says—

Q Sheriff, I don't think—

THE COURT: Let him finish his answer.

later tried, the substance of the statement was damaging because it was inconsistent with prior statements. Appellant contends that the trial court erred in admitting the statement into evidence. We find no authority to uphold his position. There is nothing in the record to indicate that the interrogation by the sheriff did not cease once appellant requested an attorney. The decision to have a lawyer is not irrevocable. If the evidence shows, as it does in this case, that a defendant voluntarily seeks out a law enforcement officer to make a statement, after being fully advised of his rights on two occasions, he may do so, thereby waiving the protection afforded by Miranda. See *Michigan v. Mosley,* 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), wherein the United States Supreme Court held that a statement given by defendant to an investigating officer was admissable even though the defendant had asserted his right to remain silent during an earlier interrogation that same day.

Having determined that no reversible error has been made to appear which would require a new trial, we proceed to examine the sentence imposed.

THE WITNESS:

A I'm just reading the statement. The statement says—the suspect, at this point, said he didn't know anything about what we were talking about. At this point I pulled the jacket out. I said—at this point I pulled out a tan jacket from the bag and unfolded it and asked if that was his jacket. The suspect said it was, and I asked him where he left it and he said that he left it in the car. At this point, he said, "I want a lawyer."

[11] In the trial court's written findings,[3] upon which the sentence of death was based, the Court considered as a separate aggravating circumstance the fact that the murder of Mrs. Butler was committed for pecuniary gain [Section 921.141(5)(f), Florida Statutes (1973)] while appellant was engaged in the commission of a robbery [Section 921.141(5)(d), Florida Statutes (1973)]. We have held that this procedure constitutes error, at least where mitigating circumstances are present. *Provence v. State,* 337 So.2d 783 (Fla.1976). Where there is a doubling up of aggravating circumstances, but no mitigating circumstances, as is the case here, a sentence of death may be upheld. *Elledge v. State,* 346 So.2d 998 (Fla.1977).

Accordingly, the judgement is affirmed and the sentence of death upheld.

It is so ordered.

OVERTON, C. J., and ADKINS, ENGLAND, SUNDBERG and KARL, JJ., concur.

HATCHETT, J., concurs specially with an opinion.

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3 The Court finds, from the evidence, that sufficient aggravating circumstances exist as enumerated in Subsection (5) of Section 921.141, Florida Statutes, that justify a sentence of death, and that there are insufficient mitigating circumstances, as enumerated in Subsection (6) of said Section 921.141, to outweigh the aggravation circumstances. The aggravating circumstances found by the Court are as follows:

1. The murder of ANN PATTERSON BUTLER was committed while the Defendant was engaged in commission of a robbery.

2. The murder of ANN PATTERSON BUTLER was committed for pecuniary gain.

3. The murder of MARY FRANCES PRICE was committed while the Defendant was engaged in flight after committing a robbery.

4. The murder of MARY FRANCES PRICE was committed while the Defendant was engaged in the commission of the crime of kidnapping.

5. It is the Court's opinion, from the evidence, that both of the aforesaid capital felonies were committed for the additional purpose of avoiding a lawful arrest.

BOYD, J., concurs in part and dissents in part with an opinion.

HATCHETT, Justice, concurring specially.

In *Spenkelink v. State,* 350 So.2d 85 (Fla.1977), I expressed by belief that Section 921.141, Florida Statutes (1975), is unconstitutional on its face and as applied. Both the United States Supreme Court and this Court have held otherwise. I see no purpose to be served by reiterating my views in future cases where the death penalty is imposed.

BOYD, Justice, concurring in part, dissenting in part.

I concur in affirmance of the judgement of guilt. I dissent to upholding the sentence because of the improper doubling of the aggravating circumstances. *Provence v. State,* 337 So.2d 783 (Fla.1976).

In a case where the stakes, life or death, are so great, I cannot treat that mistake as lightly as does the majority. I do not read *Elledge v. State,* 346 So.2d 998 (Fla.1977), to hold otherwise. The existence of unknown mitigating circumstances in *Elledge* and the finding of none by the trial judge here is not a sufficient basis, to my mind, for not applying the *Elledge* reasoning. The following, from *Elledge,* summarizes my view,

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case for a new sentencing trial at which the [impermissible factor] will not be considered. *Elledge,* at 1003.

I would vacate the sentence of death and remand for a new sentencing proceeding.

Carl JACKSON, Appellant,

v.

STATE of Florida, Appellee.

No. 60202.

Supreme Court of Florida.

July 28, 1983.

Rehearing Denied Sept. 30, 1983.

The Circuit court in and for Bay County, W. Fred Turner, J., denied motion for postconviction relief, and movant appealed. The Supreme Court, Adkins, J., held that movant, who was found guilty of robbery, kidnapping and two counts of first-degree murder and sentenced to death, was not denied effective assistance of counsel at trial, sentencing or on appeal.

Affirmed.

Ehrlich, J., dissented.

Larry G. Turner of the Law Offices of Larry G. Turner, and Bill Salmon of the Law Offices of Bill Salmon, Gainesville, for appellant.

Jim Smith, Atty. Gen. and David P. Gauldin, Asst. Atty. Gen., Tallahassee, for appellee.

ADKINS, Justice.

This is an appeal from an order of the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County denying

a motion for post-conviction relief. We have jurisdiction. Art. V, 3(b)(1), Fla. Const.

Appellant, Carl Jackson, was charged with robbery, kidnapping, and two counts of first-degree murder. The crimes are described in more detail in our opinion in *Jackson v. State,* 359 So.2d 1190 (Fla.1978), *cert. denied,* 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979)(hereinafter *Jackson* I). Ms. Dedee Costello was appointed to represent appellant at trial and entered on his behalf a plea of not guilty. He was, however, found guilty on all counts.

At the conclusion of the sentencing phase of the trial, the jury recommended that appellant be put to death for both murders. The trial court concurred and imposed the death penalty, which this Court affirmed. *Jackson* I. Appellant thereafter filed in the circuit court, pursuant to Rule 3.850, Florida Rules of Criminal Procedure, a motion for post-conviction relief alleging several infirmities in the conduct of his trial. The circuit court denied the motion and this appeal followed.

[1] Three of the four issues argued by appellant are matters that could or should have been raised on direct appeal, and so are not cognizable in this proceeding. *Adams v. State,* 380 So.2d 423 (Fla.1980). Appellant's allegations that the excusal of certain prospective jurors violated *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), could and should have been raised in his initial appeal to this Court. *Meeks v. State,* 382 So.2d 673 (Fla.1980). Similarly, he should have argued the questions of whether the trial court erred by not ordering a presentence investigation and whether the judge's jury instructions and sentencing order violated the decision in *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). We need not consider those three issues in this opinion.

[2] The issue properly raised in this proceeding is appellant's contention that the trial court erred in finding that he was afforded effective assistance of counsel at trial, sentencing, and appeal. First in the list of alleged errors and omissions is defense counsel's "failure to adequately conduct discovery, investigate, and prepare in anticipation of trial." Appellant notes that his attorney deposed only one of the more than twenty potential witnesses named on a list provided by the state and so was "obviously disadvantaged" in her cross-examination of the state's witnesses. The lack of depositions also hindered counsel's attempts to have suppressed certain evidence introduced at trial, claims appellant.

Next in the list of alleged errors are the failure to timely object to the introduction of a fingerprint which appellant claims was not properly marked as his and counsel's "ineffective" efforts to obtain a change in venue. Both are attributed to his attorney's "lack of experience and preparation."

Defense counsel's voir dire examination of potential jurors is faulted in several ways. Appellant argues that the issues of pre-trial publicity and racial bias were only cursorily and ineffectively delved into, and that counsel's *Witherspoon* inquiry was glaringly deficient. Also faulted are his counsel's failure to request sequestered voir dire of certain prospective jurors and to ask for additional peremptory challenges after using the forty allotted appellant.

The total "failure to investigate and present a defense" is a significant example of the inadequate representation which he received, claims appellant. He argues that his lawyer was made aware of several individuals whose testimony might have provided an alibi defense, and that she failed to investigate and develop the same simply because an assistant state attorney assured her that the men in

question would testify that they had *not* been with appellant at the relevant times. Finally, appellant notes that his counsel failed to request jury instructions on the effect of a jury recommendation of mercy and did not request a presentence investigation report before the trial court passed sentence.

In *Knight v. State,* 394 So.2d 997 (Fla.1981), we established the standards which must be met by a party alleging ineffective assistance of counsel as here. The four-part test requires:

> First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.
>
> Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel. As was explained by Judge Leventhal in *DeCoster III [United States v. DeCoster,* 624 F.2d 196 (D.C.Cir.1979)]: "To be 'below average' is not enough, for that is self evidently the case half the time. The standard of shortfall is necessarily subjective, but it cannot be established merely by showing that counsel's acts or omissions deviated from a checklist of standards." 624 F.2d at 215. We recognize that in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances.
>
> Third, the defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings. In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error. This

> requirement that a defendant has the burden to show prejudice is the rule in the majority of other jurisdictions.
>
> Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the state still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact. This opportunity to rebut applies even if a constitutional violation has been established.

394 So.2d at 1001 (footnote omitted).

Although appellant met the first requirement above, he failed to show that most of the omissions were serious deficiencies beyond what would be expected of competent counsel. His expert witness' testimony that defense counsel's pre-trial discovery and motions were inadequate was countered by that of appellee's expert witness who stated that the representation provided was "reasonably effective." The trial court agreed with appellee's witness and nothing in the record compels us to disturb that result.

The lack of objection to the labeling of the fingerprint also fails to convince us that counsel was ineffective. Even if we agreed that such was measurably below what is expected of competent attorneys, it certainly did not so prejudice appellant that he might otherwise not have been found guilty, since it was not disputed that his fingerprint was found at the scene.

The remainder of the alleged shortcomings may be dismissed in a similar manner. The "failure to investigate and present a defense" and to request instructions on the effect of a jury recommendation of mercy do not fall measurably below the standard expected of competent counsel. Although appellant is obviously dissatisfied with the result of the defense that was presented, we will not use the perfect

vision of hindsight and label that defense incompetent. It was, under the circumstances, a reasonable strategy.

Defense counsel's voir dire examination regarding pretrial publicity, racial bias, and imposition of the death penalty was not so lacking as to be considered incompetent. If it was deficient at all, it was not substantial enough to demonstrate a prejudice to appellant so severe that it affected the outcome of the proceedings. The record shows that appellant's guilt was clearly and convincingly demonstrated by more than adequate evidence. Any shortcomings in voir dire were not the conclusive and decisive factors in his conviction.

As the trial court noted in denying appellant's rule 3.850 motion, a "textbook defense" is not the requirement here. The trial court heard the arguments in the 3.850 hearing, considered the expert testimony presented by both sides, and determined that the representation afforded appellant was adequate. None of the arguments raised convince us that said decision was unsubstantiated or incorrect, and so the trial court's decision is affirmed.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON and McDONALD, JJ., concur.

EHRLICH, J., dissents.

Carl JACKSON, Appellant,

v.

STATE of Florida, Appellee.

Carl JACKSON, Petitioner,

v.

Louie L. WAINWRIGHT, Respondent.

Carl JACKSON, Petitioner,

v.

STATE of Florida, Respondent.

Nos. 65429, 65430 and 65431.

Supreme Court of Florida.

June 12, 1984.

Defendant, who was sentenced to death on a murder conviction, appealed from an order of the Circuit Court, Bay County, W. Fred Turner, J., denying his second motion for postconviction relief and filed petitions for writs of habeas corpus and extraordinary relief. The Supreme Court, Adkins, J., held that: (1) appellate counsel was not ineffective for failing to raise issues which were not properly preserved at trial; (2) defendant was not entitled to a hearing that would be in addition to and aside from that determination made by the governor's commission of psychiatrists as to whether he was competent to be executed; and (3) defendant

was not entitled to a judicial determination of his competency to assist counsel either in preparing a postconviction motion or a petition for writ of habeas corpus.

Affirmed; petitions for habeas corpus and extraordinary relief denied; and application for stay of execution denied.

Overton, J., concurred specially with an opinion.

Larry G. Turner and Robert S. Griscti of Turner, Kurrus & Griscti, Gainesville, and William B. Salmon of the Law Offices of William B. Salmon, Gainesville, for appellant/petitioner.

Jim Smith, Atty. Gen. and David P. Gauldin, Asst. Atty. Gen., Tallahassee, for appellee/respondent.

ADKINS, Justice.

This is an appeal from an order of the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County denying appellant's second motion for post-conviction relief. We also have before us a petition for habeas corpus. We have jurisdiction. Art. V, § 3(b)(1),(9), Fla. Const.

Carl Jackson (hereinafter appellant), was convicted of robbery, kidnapping, and two counts of first-degree murder. This Court affirmed the murder conviction and sentence of death in *Jackson v. State,* 359 So.2d 1190 (Fla.1978), *cert. denied,* 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979)(hereinafter *Jackson* I). Appellant then filed a motion in the circuit court for post-conviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure alleging several infirmities in the conduct of his trial. The circuit court denied the motion. This Court affirmed. *Jackson v. State,* 437 So.2d 147 (Fla.1983), *cert. denied,* ___U.S.___, 104 S.Ct. 1016, 79 L.Ed.2d 246 (1984)(hereinafter *Jackson* II). Appellant then filed a second 3.850 motion in the circuit

court, a motion for a hearing and appointment of experts for determinations of defendant's competency and for a stay of execution during the pendency thereof, and an application for a stay of execution. The circuit court denied the motions and this appeal followed. Appellant has also filed a petition for writ of habeas corpus in this proceeding. For the reasons which we express below, we affirm the denial by the circuit court of appellant's second 3.850 motion and his motion for a judicial determination of competency. Appellant's petition for writ of habeas corpus and his application for a stay of execution are also hereby denied.

Appellant contends in his second 3.850 motion that under the standard enunciated by the United States Supreme Court in *Strickland v. Washington,* ___U.S.___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), he received ineffective assistance of counsel at his trial. He argues that the United States Supreme Court in that opinion announced new standards for assessing ineffectiveness claims and specifically rejected the standards of *Knight v. State,* 394 So.2d 997 (Fla.1981), by which we judged appellant's claim in his first 3.850 motion.

In *Knight v. State,* this Court adopted four principles encompassed in *United States v. DeCoster,* 624 F.2d 196 (D.C.Cir.1979)(en banc), by which a claim of ineffective assistance of counsel must be judged:

> First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.
>
> Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel....
>
> Third, the defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial

> enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings....
>
> Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the state still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact.

394 So.2d at 1001.

In *Strickland v. Washington,* the United States Supreme Court held that a defendant's claim of ineffective assistant of counsel has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

104 S.Ct. at 2064.

[1] To further explain the appropriate test for proving prejudice, the Court then held that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 2068. We are of the opinion that this test does not differ significantly with the *Knight* standard of "a likelihood that the deficient conduct affected the outcome of the court proceedings;" hence, we do not reconsider our first

opinion denying appellant's claim of ineffectiveness of trial counsel.

[2] Appellant argues next in his second 3.850 motion that the death penalty in Florida is imposed in an arbitrary and discriminatory manner on the basis of race. This issue has been foreclosed by this Court in *Sullivan v. State,* 441 So.2d 609 (Fla.1983). More recently, the United States Supreme Court in *Wainwright v. Ford,* No. A-980, 3 (U.S. May 31, 1984), noted that "the statistical evidence relied upon by Ford to support his claim of discrimination was not sufficient to raise a substantial ground upon which relief might be granted." Appellant here relies on the same statistical evidence presented by Ford in his appeal; hence, there is no merit to this issue.

Finally, regarding appellant's other issues raised in his 3.850 motion, we agree with the trial judge that these could have been raised, should have been raised, or were raised in previous proceedings either on direct appeal or in his first 3.850 motion. *Meeks v. State,* 382 So.2d 673 (Fla.1980).

[3] Appellant has also filed a petition for writ of habeas corpus in this Court, alleging ineffective assistance of appellate counsel. We find that only one of these points merits discussion, because the alleged errors were not preserved at trial. Appellate counsel cannot be ineffective for failing to raise issues which were not properly preserved at trial, because the appellate court may not review those issues. *State v. Barber,* 301 So.2d 7 (Fla.1974).

Appellant does allege that a proper objection was made in the trial court concerning an alleged *Witherspoon* [*Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)] violation. Juror Powell was excluded for cause after he stated that he "didn't believe in capital punishment." However, the record shows that defense counsel's objection was not to the excusal of the juror for

cause on these grounds, but to the form of the prosecutor's question. Hence, this issue was not properly preserved at trial, and appellate counsel was not ineffective for failing to raise it on direct appeal. *State v. Barber.*

Appellant also alleges is his petition for writ of habeas corpus that this Court failed to consider an issue properly raised by him in his direct appeal in *Jackson* I, to wit, that the trial court erred in overruling Jackson's trial counsel's objection to the prosecutor's statements that unless strong mitigating circumstances were demonstrated, the jury must return death verdicts.

[4] Our capital sentencing statute, section 921.141, Florida Statutes (1983), requires this Court to review the entire record in each capital case to determine if the judgement of conviction and sentence was proper. The absence of discussion in our written opinion in this case is not an indication that we did not carefully review the entire record and each argument made by appellate counsel in the direct appeal. We did not abrogate our duty in this case; therefore, we see no reason to disturb appellant's conviction and sentence on this basis.

[5] Finally, in his petition for habeas corpus, as well as in a separately filed petition for issuance of the Court's writ of extraordinary relief, appellant requests two separate judicial determinations as to his competency. First, he requests that a hearing be held to determine whether he is competent to be executed. He argues that this judicial determination should be made in addition to and aside from that determination made under section 922.07, Florida Statutes (1983), by the governor's commission of psychiatrists. This issue has been adversely decided against appellant in our decision in *Goode v. Wainwright,* 448 So.2d 999 (Fla.1984), and most recently in *Ford v. Wainwright,* 451 So.2d 471 (Fla.1984).

[6,7] Second, appellant requests a judicial determination of his competency to understand the nature of and assist his counsel in post-conviction proceedings. Appellant relies on section 916.11 and 916.12, Florida Statutes ((1983), and Rule 3.210, Florida Rules of Criminal Procedure to support his argument. This reliance is misplaced, however, because the statutes and the rule both address the issue of a judicial determination of competency related to criminal trial proceedings. These do not apply to a 3.850 motion because the designation of the criminal procedure rule is a misnomer in that the proceeding is civil in nature, rather than criminal, and is likened to a combination of the common-law writ of habeas corpus and a motion for writ of error coram nobis. *Dykes v. State,* 162 So.2d 675 (Fla. 1st DCA 1964). Therefore, we hold that appellant is not entitled to a judicial determination of his competency to assist counsel either in preparing a 3.850 motion or a petition for writ of habeas corpus.

Accordingly, the denial of appellant's second 3.850 motion is hereby affirmed. His petition for extraordinary relief, his petition for writ of habeas corpus, and his application for stay of execution are also hereby denied.

It is so ordered.

ALDERMAN, C.J., and BOYD, McDONALD, EHRLICH and SHAW, JJ., concur.

OVERTON, J., concurs specially with an opinion.

OVERTON, Justice, specially concurring.

Competency of a defendant to stand trial and competency of a defendant to aid his counsel in an appeal are not the same. In the first instance, a defendant has to be able to advise counsel of facts and circumstances to aid in his defense. In the second instance, the record has been made and counsel must make the legal decision of what issues should be

appealed. Similarly, when post-conviction relief is sought, the competency of the defendant is significant only when there are factual matters in issue that must be determined. In my view, before a defendant may require a trial court to hold a hearing on his competency to aid counsel in a post-conviction relief proceeding, the defendant must show that there are specific factual matters that must be heard. That circumstance has not been established in this record and no prejudice has been specifically demonstrated by this defendant.

Carl JACKSON, Petitioner,

v.

Richard L. DUGGER, etc., et al., Respondent.

No. 71960

Supreme Court of Florida

June 16, 1988.

Rehearing Denied September 19, 1988.

Prisoner incarcerated under death sentence petitioned for writ of habeas corpus. The Supreme Court held that sentencing error in instruction limiting jury to consideration of statutorily enumerated mitigating circumstances was harmless.

Petition denied.

Kogan, J., dissented and filed opinion in which Barkett, J., concurred.

Larry G. Turner, Robert S. Griscti and Bill Salmon, Gainesville, for petitioner.

Robert A. Butterworth, Atty. Gen., and Mark C. Menser, Asst. Atty. Gen., Tallahassee, for respondents.

PER CURIAM.

This is a petition for writ of habeas corpus in which petitioner, Carl Jackson, seeks to set aside his death sentence under the rationale of *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). We have jurisdiction. Art. V, §§ 3(b)(1)&(9), Fla. Const.

[1] In *Hitchcock* the United States Supreme Court found reversible error where the jury was instructed to consider only statutorily enumerated mitigating circumstances and where the trial judge did not consider nonstatutory mitigating circumstances. Jackson is not barred from raising this claim since *Hitchcock* represented a significant change in the law which defeats the suggestion of procedural default. *Thompson v. Dugger,* 515 So.2d 173 (Fla.1987), *cert. denied,* ___U.S.___, 108 S.Ct. 1224, 99 L.Ed.2d 424 (1988); *Downs v. Dugger,* 514 So.2d 1069 (Fla.1987).

Jackson was convicted of two counts of first-degree murder and sentenced to death. The judgement and sentence were affirmed in *Jackson v. State,* 359 So.2d 1190 (Fla.1978), *cert. denied,* 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979). Subsequent motions for postconviction relief were also denied. *Jackson v. State,* 437 So.2d 147 (Fla.1983), *cert. denied,* 465 U.S. 1013, 104 S.Ct. 1016, 79 L.Ed.2d 246 (1984); *Jackson v. State,* 452 So.2d 533 (Fla.1984).

In the course of robbing a Jr. Food Store, Jackson shot and killed the store clerk, Ann Patterson Butler. He then kidnapped Mary Frances Price who was sitting in a car outside the store. Jackson drove Mrs. Price to a nearby cemetery where he shot her in the head and abandoned the automobile.

At the trial the judge read the standard jury instruction of that time which was found faulty twelve years later in *Hitchcock.* The jury recommended death by an eleven-to-one vote. In imposing the death sentence, the trial judge found five aggravating circumstances (reduced by this Court to

four because of doubling) and found no mitigating circumstances. It is unclear whether the trial judge knew that he could consider nonstatutory mitigating evidence. On the one hand, he did not limit Jackson in the introduction of nonstatutory mitigating evidence. On the other, he did give the improper jury instruction, and his sentencing order made reference to insufficient mitigating circumstances "as enumerated" in section 921.141(6), Florida Statutes.

[2] In any event, because of the erroneous jury instruction, we are compelled to conclude that a sentencing error occurred under the rationale of Hitchcock. Therefore, the only remaining question is whether such error can be considered harmless. *Hitchcock; Booker v. Dugger,* 520 So.2d 246 (Fla.1988); *Delap v. Dugger,* 513 So.2d 659 (Fla.1987).

The nonstatutory mitigating evidence introduced at the trial may be summarized as follows. A psychologist who had interviewed Jackson three times testified that Jackson told him of serving three tours of duty in Vietnam before receiving a general discharge. Jackson related that as a result of his Army service, he no longer approved of killing. The psychologist was impressed with Jackson's religious philosophy. He expressed no opinion concerning Jackson's mental condition. A woman with whom Jackson was living said that he was good to her and her children. She had not known him to be violent except on one occasion during an encounter with her husband. Jackson's niece also testified that he was not violent. She said that he was a religious person, although he did not belong to a church. A minister who had known Jackson most of his life said that they often talked about religion. Jackson had told him that he felt that the world was lacking in love. He said that Jackson had a good reputation.

Viewed in its best light, the nonstatutory mitigating evidence was minimal. We are convinced beyond a

reasonable doubt that even with the proper jury instruction, the jury would not have made a recommendation of life imprisonment for this double murder. There was simply insufficient mitigating evidence to offset the aggravating circumstances upon which the jury could have reasonably predicated such a recommendation. We are also convinced beyond a reasonable doubt that, regardless of a jury recommendation of life imprisonment, the trial judge would have sentenced Jackson to death even if he was fully aware that nonstatutory mitigating evidence was relevant. Moreover, on this evidence, an override would have been consistent with the rationale of *Tedder v. State,* 322 So.2d 908 (Fla.1975). *See Hall v. State,* 531 So.2d 76 (Fla.1988), in which this Court recently held a *Hitchcock* error to be harmless because of minimal nonstatutory mitigating evidence where only one killing was involved.

We deny the petition for writ of habeas corpus.

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH, SHAW and GRIMES, JJ., concur.

KOGAN, J., dissents with an opinion, in which BARKETT, J., concurs.

KOGAN, Justice, dissenting.

I dissent from the majority opinion. I cannot say beyond a reasonable doubt that the jury would not have recommended a life sentence had they been instructed by the trial judge that they could consider as mitigating circumstances the defendant's three tours of combat duty in Vietnam. If having been so instructed they returned a life recommendation, the trial judge, under *Tedder v. State,* 322 So.2d 908 (Fla.1975), would not have been able to override this recommendation, since the jury would have had a reasonable basis for their action.

I would, therefore, grant the petition for a writ of habeas corpus, vacate the sentence of death and remand this case to the trial court for a new sentencing proceeding before a new jury.

BARKETT, J., concurs.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-3237

CARL JACKSON,

Petitioner-Appellant,

versus

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections,

Respondent-Appellee.

On Appeal from the
United States District Court for the
Northern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion April 29, 1991, 11th Cir., 1991, ___F.2d___).

Before: JOHNSON, EDMONDSON and COX, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

EDMOND R. COX
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

CARL JACKSON,

Petitioner,

vs. Case Number 90-50069

RICHARD L. DUGGER,

Respondent.

RULING OF THE COURT AT HEARING

Hon. Roger Vinson
U.S. District Judge
Pensacola, Florida
March 23, 1990

APPEARANCES:

Mr. Mark C. Menser
Mr. Richard Martell
Assistant Attorney Generals
Tallahassee, Florida
Appearing on behalf of the respondent.

Mr. Billy H. Nolas
Ms. Gail Anderson
Attorneys at Law
Office of the Capital
Collateral Representative
Tallahassee, Florida
Appearing on behalf of the petitioner.

(12:47 P.M. Open court.)

THE COURT: Counsel are here, and as I've indicated, it's my intent to go ahead and rule on the motion now in order that either side can promptly pursue the route of appeal to the Eleventh Circuit, and the Eleventh Circuit is currently standing by to facilitate some prompt assignments of judges and consideration of the matter.

After thorough analysis of everything that's been presented, both in writing and here orally this morning, it's my conclusion that I'm going to deny the petition for the writ. Let me say that this is a very close issue; and as I've previously announced to you, I think the predominant issue and the one that I think is most meritorious is the harmless error claim under *Hitchcock*. My concern is that the harmless error rule or *Hitchcock* error is somewhat unresolved by the Eleventh Circuit. The most recent opinion from the Eleventh Circuit in *Tafero vs Dugger,* which was in the middle of 1989, which is the most recent one that I've found, points out in footnote page five at page 252 of 873 F. 2d, "We are aware of conflicting viewpoints in this circuit concerning the application of a harmless *Hitchcock* error standard."

There are two situations that are summarized in the Eleventh Circuit opinion in *Jones,* which arose out of this court, and it essentially says that harmless error can be found when there is no mitigating evidence presented, or if the nonstatutory mitigating evidence presented was so insignificant that it would not have altered the jury's decision. And the standard that seems to have been adopted in *Jones* is whether the reviewer, or in this case the Eleventh Circuit is, in its words, confident, and I presume inherent in that is confident beyond a reasonable doubt, that the outcome would have been different. And as I mentioned during the course of the arguments today, I don't think harmless error analysis, specifically federal harmless error analysis in the

Hitchcock claim, is something that you can make a check list on and say, "This evidence is here and that evidence is there." You have to consider the totality of the record and the circumstances. The *Jones* case itself is one in which I found there was not harmless error.

But I am inclined to agree with the seven justices, excuse me, five of the seven justices, of the Supreme Court of Florida who found that in this case, Mr. Jackson's case, that it was harmless error and they found beyond a reasonable doubt that the outcome would not have been different had all of this mitigating evidence been directly allowed, and under the instructions presented to the jury for its consideration and to the judge for his consideration. And my feeling upon analysis of the entire record is the same as those five judges of the Supreme Court of Florida who found this was harmless error.

The questions that is presented is whether that analysis is sufficient within the context of the Eleventh Circuit. Frankly, I'm unable to say this it is not in light of what obviously is conflicting viewpoints, to use the term the Eleventh Circuit has, within the circuit, upon the proper standard of review. If in fact the standard of review is traditional harmless error analysis that you view it all and find no reasonable jurors could find beyond a reasonable doubt the outcome would have been different, that would be harmless error, in so many words what is required under the rules of procedure. So that's my position in this case, that I don't find that the Eleventh Circuit standard is sufficiently well defined that I can disregard the findings of the Supreme Court of Florida and its analysis and my own overall impression of this case that the result would not have been different if all this evidence had been properly considered by the jury, as *Hitchcock* requires, as mitigating evidence.

So consequently in the interest of comity, I am agreeing with the Supreme Court of Florida, and recognizing too that this an issue that ultimately will have to be decided by the Eleventh Circuit, and perhaps this is the time and the case for them to make that decision, if they have not already done so by the time this case reaches that decision-making process. I certainly agree that this is a case that warrants consideration by the Eleventh Circuit and probable cause is certified. But the stay is denied. I think you do have sufficient time to at least present the case to the Eleventh Circuit, and if they feel a stay is warranted they'll have time to at least consider that and issue a stay if they feel it's needed.

So to summarize, I will follow up with a written order but I think in the interest of time, the remaining claims I do not find any of them, as I tentatively indicated to you, I do not find any of them to be meritorious enough to warrant issuance of the writ or a stay. I personally feel that the real issue in this case is the harmless error analysis of *Hitchcock* and I think it's a very close question, no doubt about that, and I think different minds can reach differing conclusions about it, as evidenced by the Supreme Court of Florida, which was five to two decision, and as evidenced by various opinions from district court judges here in the State of Florida, including myself, on the proper way to conduct a harmless error analysis in these types of cases.

I think that concludes everything that needs to be stated on the record. Unless there's something else. Anything from petitioner?

MR. NOLAS: Yes, Your Honor, in terms of expediting the case, we have a standard order granting certificate of probable cause. I'm not suggesting Your Honor needs to enter that.

THE COURT: I have it in front of me.

MR. NOLAS: If you could just look it over.

THE COURT: I'm in the middle of signing it right now.

MR. NOLAS: Thank you, Your Honor. The only other question I have for Your Honor is does Your Honor have any anticipation when you would be entering a formal order on the merits?

THE COURT: My experience has been these things always take longer than you think you should because there are so many cases and the law obviously has developed and is continuing to develop almost daily, and there are so many claims. Some of them may not necessarily warrant a great deal of discussion, but some of them probably need more than just a passing reference, so I would not anticipate that it would be forthcoming within the next two weeks because next week is a relatively full week for me and I don't think I'll have time to spend a great deal of effort working on this. I don't think it's necessary for appellate review for me to have that formal order on the record, though, since I'm announcing essentially my conclusion on it here.

MR. NOLAS: Not to interrupt you, Judge, that does pose a problem, and that is in order to send the case to the Eleventh Circuit we need to file notice of appeal. Having filed notice of appeal Your Honor would be divested of jurisdiction in the case so therefore anything after it would be a nullity. The Catch-22 I'm in is, I don't know if it would be appropriate for us to stipulate to Your Honor's on-the-record ruling as an order, but the problem is I don't know how to get the case to the Eleventh Circuit.

THE COURT: Let me assist you then. In lieu of a written order let me just announce my findings on the record here, which are essentially these, that on the harmless error issue I find it's a very close question; that in light of all of the precedent that I've cited, I think, previously, and it's not

necessary to go back through the cases, but all the cases that have considered *Hitchcock* harmless error, I am unable to say that this is a case which is not harmless error, and in comity with the Supreme Court of Florida and its conclusion it is harmless error and my own personal feeling after looking at all the evidence and going back and rereading everything that is relevant to that, that it is harmless error, I do not find anything in the Eleventh Circuit that would require me as a matter of law or federal harmless error review standards to overturn that. So my finding is that it's harmless error and I think that's sufficient to take that issue to the Eleventh Circuit.

As to the remaining claim, without going into a great deal of detail because there are a number of them, but I've reviewed them and I don't find any of them are sufficiently meritorious to warrant issuance of the writ or stay. That's on the record. Mr. Suda can transcribe that this afternoon for you and that can be forwarded to the Eleventh Circuit.

MR. NOLAS: Correct. Then with that, Your Honor, we would have Your Honor's permission to go ahead and file notice of appeal?

THE COURT: Absolutely. I want you to do that. That's behind why we've expedited the hearing today and everything else.

MR. NOLAS: Thank you, Your Honor.

THE COURT: Anything else from the state?

MR. MENSER: No. Your Honor.

THE COURT: In that case we're adjourned.

(At 12:58 PM the hearing was adjourned.)

EDITOR'S NOTE

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91-574

Supreme Court, U.S.
FILED
OCT 22 1991
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OCTOBER TERM, 1991

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. _____

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Petitioner,

v.

CARL JACKSON,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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51pp

PRELIMINARY STATEMENT

The petition for writ of certiorari filed by the Florida Attorney General requests that this Court review and reverse the unanimous decision of the United States Court of Appeals for the Eleventh Circuit which found that the proceedings resulting in Carl Jackson's sentence of death violated the eighth and fourteenth amendments to the United States Constitution. The eighth amendment violation was the same as the one which this Court unanimously found to violate the Constitution in Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987). As in Hitchcock, the Court of Appeals found that the Florida proceedings resulting in Carl Jackson's death sentence did not allow for the meaningful consideration of mitigating evidence. The Court of Appeals also concluded "that Jackson presented significant nonstatutory mitigating evidence that was not considered by the jury or judge because of the Hitchcock violation"; that "reasonable jurors could base a decision" to vote for life on the evidence; and that the constitutional error therefore could not be deemed harmless beyond a reasonable doubt. Jackson v. Dugger, 931 F.2d 712, 717-18 (11th Cir. 1991). The Florida Attorney General's requests for rehearing and rehearing en banc were then denied by the Court of Appeals with "no member of [the] panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc." Jackson v. Dugger, No. 90-3237, Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc, April 29, 1991 (Petitioner's Appendix A-45).

This response discusses the propriety of the ruling of the

unanimous Court of Appeals, a ruling that is in full accord with the eighth amendment precedents of this Court and with the precedents of the Eleventh Circuit in cases involving claims of Hitchcock error. Given the Court of Appeals' ruling, its consistency with settled precedent, the parties' positions below, and the current arguments of the Attorney General, we respectfully submit that neither an issue of substance nor an issue open to debate is presented by the Attorney General's petition. Because the petition presents no valid reason warranting a reversal of the decision of the Court of Appeals, we respectfully submit that the request for certiorari review should be denied.

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OPINIONS BELOW

The Respondent agrees with the Petitioner's statement. The Respondent also notes that during the hearing at which the District Court orally pronounced its ruling the Court made certain observations which related to its ruling but which are not reproduced in the Petitioner's transcript excerpt. The text of this response discusses the relevant observations.

JURISDICTION

The Respondent agrees with the Petitioner's statement.

CONSTITUTIONAL PROVISIONS INVOLVED

The Respondent agrees with the Petitioner that this case involves the Eighth Amendment to the United States Constitution. The Respondent additionally respectfully submits that this case involves the Fourteenth Amendment to the United States Constitution. The Respondent submits that this case involves no Tenth Amendment issues.

INTRODUCTION AND STATEMENT OF THE CASE

The Respondent respectfully submits that there are significant deficiencies in the Petitioner's statement of the case. This discussion is intended to provide a proper perspective relating to the ruling of the Court of Appeals, the positions of the parties, and the relevant facts, as well as an overview of what this case involves in light of the applicable precedents.

The opinion of the Eleventh Circuit Court of Appeals is reported as Jackson v. Dugger, 931 F.2d 712 (11th Cir. 1991). A copy of the opinion is appended hereto. The State's petition for

rehearing and suggestion for rehearing en banc was denied on April 29, 1991, with no Judge serving on the Court suggesting that the decision should be reheard (Petitioner's Appendix A-45). The Court of Appeals' panel was comprised of Judges Cox, Johnson, and Edmondson. Judge Cox authored the opinion. The Court's opinion listed the previous rulings of the state courts during direct appeal and post-conviction proceedings. See Jackson v. Dugger, 931 F.2d at 714. These opinions were also listed at pp. 1-2 of the State's petition ("Opinions Below") and were included in the Appendix to the Petition. The opinion of the Florida Supreme Court relating to the Hitchcock issue is reported as Jackson v. Dugger, 529 So.2d 1081 (Fla. 1988). The District Court did not issue a written order but made a brief oral statement denying relief.

A. Introduction[1]

Every court which has considered the issue has agreed that the eighth amendment was violated during the proceedings resulting in Carl Jackson's death sentence and each court has agreed that the error involved in this case is the same as the one upon which this Court unanimously granted relief in Hitchcock v. Dugger itself. See e.g., Jackson v. Dugger, 931 F.2d 712, 716 (11th Cir. 1991) ("In this case, the State of Florida concedes, and both the Supreme Court of Florida and the district court

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[1] The citation method employed in this response is the same as that employed in Mr. Jackson's initial brief to the Court of Appeals. "R." refers to the record before the Court of Appeals with volume, document, and page number citations following thereafter. "Supp. R." refers to the supplemental record before the Court of Appeals with the page number cited thereafter.

found, that Jackson's sentencing hearing violated Hitchcock."); Jackson v. Dugger, 529 So.2d 1081, 1082 (Fla. 1988) ("[A] sentencing error occurred under the rationale of Hitchcock"); Jackson v. Dugger (Hearing Before the District Court, March 23, 1990) ("I don't think it's disputed there was a Hitchcock violation") (Supp. R-8).[2] In its current petition, the State does not disagree with the Court of Appeals that the proceedings resulting in Carl Jackson's death sentence violated the eighth amendment. See Petition for Writ of Certiorari (hereinafter "Petition"), p.11 ("Carl Jackson was sentenced to death in a (Florida) penalty-phase proceeding conducted in violation of the legal standards recognized in Hitchcock v. Dugger ....")

These conclusions are plainly correct. The proceedings in Mr. Jackson's case are virtually identical to the proceedings which this Court found violative of the eighth and fourteenth amendments in Hitchcock v. Dugger. The jury was not allowed to consider mitigating factors that did not relate to the strict statutory list then in effect. See Jackson, 931 F.2d at 716 ("The trial court's instructions were almost identical to those given in Hitchcock"); see also id. at n.8 (comparing the instructions in this case to those in Hitchcock); cf. Delap v. Dugger, 890 F.2d 285, 303 (11th Cir. 1989) (finding that instructions which were the same as those given in Carl Jackson's

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[2] Although finding that Hitchcock error occurred, the district court denied relief, ruling that the error was harmless. The district court did not rule that the mitigating evidence presented by Mr. Jackson was untrue, insubstantial, unreliable, or that it was not mitigating evidence. The court did not dispute the existence of the mitigating evidence which Mr. Jackson presented and made no additional findings of fact.

case were "virtually identical" to those in Hitchcock); see also id. at 303-04 (listing cases in which such instructions have been found to violate the eighth amendment). The trial judge also restricted his own review and did not consider mitigating factors other than those enumerated in the strict statutory list then in effect in Florida. See Jackson, 931 F.2d at 716. And the prosecutor in this case presented an argument akin to the one of the prosecutor in Hitchcock -- he argued that the jury could only consider the mitigating factors "under Florida law" and that the mitigating evidence presented by Mr. Jackson was "not in [the] mitigations" and therefore was not to be considered.[3] As

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[3] Indeed, the prosecutor's penalty phase argument could not have made it clearer that the jury was not to consider the mitigating evidence presented by Mr. Jackson. The prosecutor characterized Mr. Jackson's military service as "excuses, they're not in mitigations" (R. 786), and then informed the jurors:

> I think [the judge is] going to instruct you on aggravation and mitigating circumstances. One out of about seven or eight mitigating circumstances said it would be mitigation if the defendant has no significant prior criminal activity. Then I want you to listen closely and see if there's any other mitigations that have been proved here, that is mentioned under Florida law.

(R. 787)(emphasis added). As in Hitchcock, the prosecutor informed the jury "to consider the mitigating circumstances and consider those by number" and argued that only one -- a statutory factor -- was applicable. Hitchcock, 107 S. Ct. at 1824.

The prosecutor also repeatedly urged the jurors to "listen to the mitigations, see if there's significant mitigation under the law. If there's not [and].... [i]f the aggravation is there, under the law of Florida, then I'm saying the law gives the death penalty" (R. 791). According to the prosecutor's argument, the only mitigation that counted was "significant mitigation under the law," i.e., statutory mitigation, and not "excuses", i.e., nonstatutory mitigation. The Court of Appeals found that the nonstatutory mitigation in this case was "significant." In the context of this sentencing proceeding, this significant

(continued...)

the Court of Appeals found, in Mr. Jackson's case, as in Hitchcock itself, the proceedings did not comport with the eighth and fourteenth amendments.

Substantial, "significant," Jackson, 931 F.2d at 717, evidence in mitigation had been presented on Mr. Jackson's behalf: Mr. Jackson had served eight years in the military, spent three tours of duty in combat in VietNam, was wounded during that service, and was discharged under honorable conditions; after his military discharge, Mr. Jackson received benefits from the Veterans Administration and attended college, attempting to better his life; he had strong religious convictions, convictions which aided those around him; he was amenable to incarceration; he had no prior history of violence and was well thought of by his family, friends, and minister.[4]

In the context of capital sentencing cases, this Court's precedents have consistently held that restrictions on the jury's consideration of evidence in mitigation, particularly where, as here, the evidence is evidence of substance, cannot be squared with the eighth amendment's requirements that capital sentencing proceedings be reliable and individualized. See Lockett v. Ohio, 438 U.S. 586 (1978); Penry v. Lynaugh, 109 S.Ct. 2934 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669 (1986). The eighth

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[3](...continued)
mitigating evidence was afforded no consideration, as the evidence did not fall within the strict statutory list.

[4] This list is not all inclusive but intended to summarize what the record reflects.

amendment protects capital defendants against "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 U.S. at 605. And contrary to the Attorney General's current assertions, this Court has established a standard of eighth amendment harmless error review. That standard is the one which the Court of Appeals expressly applied in this case.

This Court has indicated that a restriction on the sentencers' consideration of credible evidence in mitigation in a capital case warrants relief if the reviewing court could not "confidently conclude" that the evidence "would have had no effect upon the jury's deliberations." Skipper v. South Carolina, 476 U.S. at 8.[5] This Court applied that standard in Skipper and granted relief. And in Satterwhite v. Texas, 108 S.Ct. 1792 (1988), this Court expressly noted that the standard of harmless error review applicable to constitutional errors in capital sentencing proceedings is the "harmless beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18 (1967). Satterwhite, 108 S.Ct. at 1798. In Satterwhite, this Court first explained that,

> [i]t is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer....,

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[5] Cf. United States v. Bagley, 473 U.S. 667, 679-80 and n.9 (1985) (The standard that reversal is required where there is a "reasonable possibility that the [error] may have contributed to the result" is not in any significant way different than the standard requiring "the beneficiary of the constitutional error to prove beyond a reasonable doubt that the error ... did not contribute [to the result].")

and then held that constitutional error in capital sentencing proceedings requires a strict application of the standard requiring the State to establish that the error is harmless beyond a reasonable doubt. Satterwhite, 108 S.Ct. at 1798. "[A] reviewing court," this Court noted, "can make an intelligent judgment" about whether an error in capital sentencing "might have affected a capital sentencing jury." Id. at 1798.

This is precisely the standard of review which the Court of Appeals applied in this case. See Jackson, 931 F.2d at 716-18. And contrary to the State's suggestions, the question of whether a federal constitutional error is harmless is not a question of "fact," but one of federal law, as this Court indicated in Skipper and Satterwhite, and as the Court of Appeals noted in Mr. Jackson's case:

> The State of Florida argues that this court is bound by the [Florida] supreme court's determination that the error was harmless. We reject that argument. "The ultimate determination of whether federal constitutional error is harmless is a federal question" and therefore federal courts are not bound by state court determinations of what constitutes harmless error. Grizzell v. Wainwright, 692 F.2d 722, 725 (11th Cir. 1982), cert. denied, 461 U.S. 948, 103 S.Ct. 2129, 77 L.Ed.2d 1307 (1983). See also Booker v. Dugger, 922 F.2d 633, 636 n.4 (11th Cir. 1991).

Jackson v. Dugger, 931 F.2d at 717. See also Townsend v. Sain, 372 U.S. 293, 318 (1963)(the district court "may not defer to [state court] findings of law.... The state conclusions of law may not be given binding weight on habeas"). Accord Miller v. Fenton, 474 U.S. 104, 111-12 (1985).

This Court, the Eleventh Circuit Court of Appeals, and the Florida Supreme Court are all in agreement that a constitutionally valid resentencing proceeding is required if Hitchcock error occurs before a Florida sentencing jury or judge:

> It is well established that a sentencing body must not be limited in its consideration of mitigating circumstances. Hitchcock v. Dugger, --- U.S. ---, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Eddings v. Oklahoma, 455 U.S. 104, 113-14, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir.1985)(en banc). This principle applies both to the Florida sentencing jury and the sentencing judge. Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); see also Magill v. Dugger, 824 F.2d 879 (11th Cir.1987).

Messer v. Florida, 834 F.2d 890, 892 (11th Cir. 1987).

> [T]he standards imposed by Lockett bind both the judge and the jury under our law . . . If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.

Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987)(emphasis supplied).

> [W]hether or not the trial court believed it could consider non-statutory mitigating circumstances, [the death] sentence must be vacated because the jury was so limited.

Magill v. Dugger, 824 F.2d 879, 893 (11th Cir. 1987)(emphasis in original).

> Because the trial judge considered Jones' nonstatutory mitigating evidence in reaching his sentencing decision, the State next argues that this "curative action" rendered the erroneous instruction harmless. We do not agree. This case is nearly identical to Magill v. Dugger, 824 F.2d 879, 894 (11th Cir.1987), also involving Florida's capital sentencing scheme, in which we held that a trial court cannot, by specifically considering nonstatutory mitigating evidence, cleanse a jury recommendation which is tainted by Lockett error. Because of the importance of

> the advisory jury in the Florida capital sentencing scheme, we held that Lockett "error can be cured only by a sentencing proceeding before a new advisory jury." Id. at 894.
>
> We applied this same reasoning to jury recommendations which were tainted by Caldwell error in our decision in Mann v. Dugger, 844 F.2d 1446 (11th Cir.1988)(en banc). We observed in Mann that "the Supreme Court of Florida has recognized that a jury recommendation of death has a sui generis impact on the trial judge, an impact so powerful as to nullify the general presumption that a trial judge is capable of putting aside error." Id. at 1454. Here, as in Magill and Mann, we conclude that, because the jury recommendation resulted from an unconstitutional procedure, the entire sentencing process has necessarily been tainted. The trial judge's consideration of nonstatutory mitigating evidence, therefore, did not render harmless the Lockett error.

Jones v. Dugger, 867 F.2d 1277, 1280 (11th Cir. 1989)(footnotes omitted).[6] In Mr. Jackson's case, neither the jury nor the judge considered significant evidence in mitigation, and under settled eighth amendment principles, the error could not be deemed harmless beyond a reasonable doubt.

B. The Mitigation

There was ample mitigation in this case that the jury and judge should have been allowed to consider but did not consider because of the application of the restrictive sentencing law then in effect in Florida.

> The key aspect of the penalty trial is that the sentence be individualized, focusing on the

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[6] See also Waterhouse v. State, 522 So. 2d 341, 344 (Fla. 1988)("[W]hat is important is what the jury was permitted to consider in making its recommendation to the court."); Ruffin v. Dugger, 848 F.2d 1512, 1518 n.8 (11th Cir. 1988)("Although the jury is not the sentencer in Florida's capital sentencing scheme, it is treated as such for eighth and fourteenth amendment purposes."); Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989)("It is of no significance that the trial judge stated that he would have imposed the death penalty in any event.")

> characteristics of the individual. Gregg v. Georgia, 428 U.S. 153 (1976). Here the jurors were [not permitted to] mak[e] such an individualized determination.

Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). The same is true in Mr. Jackson's case: Here the jury was not allowed to consider anything which mitigated against death but which was not listed in the statute. The instructions and prosecutorial argument barred the jury's consideration. The judge likewise limited his own consideration.

The defense presented four witnesses at the penalty phase. Through the testimony of these witnesses significant mitigating evidence was presented. Carl Jackson was a man who had served his country in the Army for eight years, including three tours of duty in combat in VietNam, and a man who was wounded during his service to his country; Mr. Jackson wanted to make a career of the military but was badly scarred by his combat experiences; he was discharged from the military under honorable conditions;[7] he attempted to better himself by working and attending college; he was deeply and fervently religious and spent much time in religious contemplation and discussion; his history was one of

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[7] One great irony of this case is that if Mr. Jackson were to be executed, he would be entitled to full military burial rights because of his military service. Thus, his body would be escorted by a military honor guard in a flag-draped coffin; at the funeral service, the flag would be presented to Mr. Jackson's family in appreciation for his service to his country, and a military bugler would play "Taps"; he would have the right to be buried in a national cemetery; the military would provide a marker for his grave which would indicate his dates of service and the campaigns in which he fought. All this would take place although the jury was never allowed to and the judge did not consider the very evidence which entitles Mr. Jackson to these honors: his military combat service and discharge under honorable conditions.

non-violence; and he had accepted being imprisoned and would not be a disciplinary problem. See Skipper v. South Carolina. All of this evidence mitigated. However, the jury was not permitted to consider and the judge failed to consider any of it.

Dr. Cleo C. Warner, a licensed and qualified clinical psychologist, evaluated Mr. Jackson and interviewed him three times for a total of over three hours (R. 740-41). Dr. Warner explained that Mr. Jackson had been in the Army for eight years (R. 741). Mr. Jackson had intended to make the Army a career (R. 741-42), but the Army changed over the years (R. 742), and Mr. Jackson "had a change of heart . . . since he had been through as much combat as he had" (R. 743). Dr. Warner described Mr. Jackson's experiences in VietNam:

> I questioned him about that, because I thought it might tell me something about his mental state. He told me -- he said that he was in Viet Nam three times and on each of those three occasions he was in a combat situation for fairly lengthy period of time. That there was a lot of fighting and a lot of waiting and a lot of impatience and a lot of turmoil that went with being in Viet Nam. He felt like it had an effect on him.

(R. 742). Although his combat experiences took their toll, Mr. Jackson continued to serve his country. He "felt like it was his job. . . . He had been trained as a member of the Army and that was his job" (R. 742). Mr. Jackson had been discharged under honorable conditions (R. 746), and was receiving veteran's benefits as a result (R. 755).

Dr. Warner also discussed Mr. Jackson's religious beliefs with him and found them to be "strong beliefs" (R. 743). In fact, the strength of Mr. Jackson's religious beliefs deeply

impressed Dr. Warner -- a clinical psychologist who had apparently evaluated numerous prisoners and who had never before been impressed with a prisoner's religious beliefs -- to such an extent that Mr. Jackson's discussion of religion helped Dr. Warner in his own life:

Q Didn't you also talk with him about his religious beliefs?

A Quite a bit.

Q What did he tell you about those beliefs, if you recall?

A Uh --

Q Were those strong beliefs?

A Yes, they were strong beliefs, I'll be quite candid with you, all right?

Q All right.

A All right. As I told the man when I was interviewing him, I said, "I'm going to try to put it out of my mind that you are accused of killing two people, because I feel very strongly about that, personally, but I'm going to try to evaluate what you are saying to me." And so we talked a lot and he started talking about his religious beliefs. And the first time that I talked with -- I must admit, for the first time that I talked with any prisoner about their religious beliefs, that I was impressed.

Q In what way?

A I was impressed because I felt like he was able to tell me something about his religious beliefs that I never have heard from anybody before, and it was very clear. And it helped me a little bit in my life, regardless of what happens to Carl Jackson. And I told him so.

Q Do you recall what he told you?

A Yes, I recall very well, because --

Q How about telling us?

A Okay, if you would. What he told me was that

> he had -- he had been doing a lot of thinking about religion, particularly since he got dismissed from the armed services. And that he had gotten confused about it and that he had gotten in trouble by it and that he had tried to grapple with it, do this and do that. He thought about it and thought about it. His phrase was, "I thought about it until it gave me a headache, many times." He said he was trying to make sense out of his life and other people's lives, could be good or could be bad or happy or sad or successful or sinful or not sinful, and how it fit in the over all picture of God and his purpose for people. His main question that he asked himself, I guess, you can correct me if I'm wrong. His main question that he asked himself was what purpose would God have for placing man on the earth. Because man seems to be a very fallible creature, one that sins and one that does this and does that, does something else that seems bad for the earth and bad for the people, and injurious to other people, and so forth and so on. Why would God tolerate such a creature on his earth? He finally came to the conclusion, after a long thinking and long deliberation that God created man so that God would have a vehicle in each of us to come down to the earth and experience life as each of us experiences it. That whatever you are, whatever I am, and whatever each of us is, that each of us gives God a different view of what his universe or his world is like.

(R. 743-45).

Other witnesses who had been close to Mr. Jackson also testified that he was a religious person who read the Bible and tried to figure out its meaning "all the time" (R. 755), and that "he reads the Bible a lot.... He tries to rub off on other people his beliefs. He tries to tell people about God and how they should get closer to him and all" (R. 765-66). A minister who had known Mr. Jackson all of his life (R. 769), and who had been sharing rides with him to the community college (R. 770), testified that they discussed religion and that they discussed Mr. Jackson's preaching at prayer meetings (R. 771). During their discussions, Mr. Jackson "was really concerned about the conditions of the world and what the world needed and some of the

things that was going on in the world, like the lack of love, and how people were treating each other" (R. 772).

Dr. Warner also discussed Mr. Jackson's life after his discharge from the Army. After his discharge, Mr. Jackson "felt like he was kind of without a job or without a professional -- without a profession, fairly suddenly. He had difficulty finding work. . . . He attempted to go work -- he attempted to go to Gulf Coast Junior College to take, I believe, it was an electronic course" (R. 746).

Although while he was in the military Mr. Jackson "had experienced a lot of violence to himself" (R. 747), he was not a violent person. When a man had given him some trouble in the past, Mr. Jackson "attempt[ed] to make peace with him" (R. 747). Vera Nichols, the woman with whom Mr. Jackson lived at the time of the offense, testified that he was never violent toward her or toward her four children who lived with them, who "loved him" (R. 756), and who he supported.

Finally, Dr. Warner discussed Mr. Jackson's ability to adapt to imprisonment:

> He said that he had come to the point so that he could, as far as possible, accept being in jail, in the sense of tolerating it and not trying to make trouble or not trying to stir up anything or not trying to break out or not trying to do any of that sort of thing. He could accept it as far as that. But, he could accept with his religious beliefs, he said that if God, indeed, expected him to be in this place at this time so as to give God that experience, then he would have to go along with it. If that was the way that it had to be.

(R. 748-49).[8]

In addition to the evidence discussed above, the judge had additional information which was not considered. A second mental health expert, John F. Mason, M.D., a psychiatrist, had evaluated Mr. Jackson pretrial but did not testify at the penalty phase. He did, however, provide a report to the judge. That report provided even more information regarding Mr. Jackson's background and character:

> [Mr. Jackson] revealed that he was born in Panama City, Florida, April 4, 1944 of Mary Jackson and Oscar Jackson. His parents are still living; his father is 75 and his mother is 74. He is one of seven siblings of whom two are female and five are male.
>
> When questioned about his schooling he related he had attended school only through the ninth grade but received a GED high school equivalency in 1963, and again had some retesting in 1965.
>
> When questioned about his military service he related he had served from age 17 in 1962 until November 7, 1970 with rank of discharge of E-2. He had served with the Airborne, Mechanized Infantry and as an aviation crewman in Vietnam, Ft. Campbell, Kentucky; Arizona, Georgia, Hawaii, Ethiopia, Turkey and several other bases. He spent a total of 18 months in Vietnam, was wounded ... in the upper right chest ....
>
> * * *
>
> He related that [when he was discharged from the Army] he had first tried to get a civil service job with the Postal Service, then filed for unemployment and later got a job with the Springfield Sanitation Plant for about 6 weeks, then as a janitor at Rosenwall Junior High for a short period. Following this he went

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[8] The district court judge -- a trial judge who has heard the testimony of a number of mental health experts -- characterized Dr. Warner's testimony as "very effective" (Supp. R-34). Of course, despite the compelling nature of this testimony, it could not be "effective" because the jury received no instructions allowing consideration of this evidence and the trial judge limited his consideration to the statutory mitigating factors.

> to central Florida, harvesting citrus fruit and worked for short periods of time with Strickland Construction Company, Cohen Brothers of Tampa and Morgan Yacht Company, finishing the inside of yachts and then to Interspace Corporation making water pipes.

(Report of John F. Mason, M.D.) (emphasis added).

All of this evidence was classically mitigating. Evidence is "'mitigating' [when it] might serve 'as a basis for a sentence less than death.'" Skipper, 476 U.S. at 4-5, quoting, Lockett, 438 U.S. at 604. Military service establishes valid mitigation, see e.g., Masterson v. State, 516 So. 2d 256, 258 (Fla. 1987)(wounded Viet Nam veteran); Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983), and Mr. Jackson's service was substantial. Mr. Jackson was in the Army for eight years, served three tours of duty in combat in Viet Nam, was discharged under honorable conditions, was wounded and decorated, and received veterans' benefits.

Mr. Jackson's amenability to incarceration also is valid mitigation, as this Court held in Skipper, 476 U.S. at 4-5. As a result of his religious beliefs, Mr. Jackson could "accept being in jail, in the sense of tolerating it and not trying to make trouble or not trying to stir up anything or not trying to break out or not trying to do any of that sort of thing" (R. 748-49). Likewise, evidence that a capital defendant had continuously attempted to be gainfully employed and had recognized and attempted to overcome his difficulties is mitigating, as is evidence that the defendant was not violent.

C. This Court's Standard of Review and Its Application in the Eleventh Circuit

In light of the substantial mitigation in this case, it cannot be "confidently conclud[ed]" that the Hitchcock error was harmless beyond a reasonable doubt, Skipper, 476 U.S. at 8, and the Court of Appeals so found. The eighth amendment requires that capital sentencing proceedings be individualized and reliable and thus that capital sentencers "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. at 604 (emphasis in original). This requirement is necessary in order to avoid "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Id. at 605. This Court has in fact cautioned that "the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer," Satterwhite v. Texas, 108 S. Ct. 1792, 1798 (1988), and thus that review of errors in such proceedings requires the strict application of the standard that the State must prove harmlessness beyond a reasonable doubt.

Not only is the Chapman standard the one which the Court of Appeals applied here, the Eleventh Circuit has consistently applied that standard to the review of cases involving Hitchcock error, and this Court has never indicated that the Court of Appeals has been acting improperly in applying this Court's harmless error standard. Most recently this Court denied

certiorari review in Singletary v. Booker, 111 S.Ct. ___ (1991), previous history, Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991) (applying the same standard of harmless error review as the one applied in Carl Jackson's case). The pendency of a certiorari petition filed by the Florida Attorney General in Booker was relied on by the Attorney General's request for certiorari review in Mr. Jackson's case.

The Eleventh Circuit has found Hitchcock errors to be harmless, see Tafero v. Dugger, 873 F.2d 249, 252 (11th Cir. 1989) (error harmless where "[t]he factors presented by Tafero contain little mitigating value"), cert. denied, 110 S.Ct. 1834 (1990); Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989), cert. denied, 110 S.Ct. 1834 (1990); Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987), cert. denied, 485 U.S. 982 (1988), while in cases, like this one, where the error had an effect on the verdict, the Court has found that the State has not established harmlessness beyond a reasonable doubt. See Delap v. Dugger, 890 F.2d 285, 306 n.23 (11th Cir. 1989) ("The presence of substantial nonstatutory mitigating evidence in this case ... is sufficient to render the Hitchcock error not harmless beyond a reasonable doubt"), cert. denied, 110 S.Ct. 2628 (1990). See also Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991) (same), cert. denied, 111 S.Ct. ___ (1991).[9]

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[9] The standard was discussed by the Eleventh Circuit in this case, see Jackson, 931 F.2d 716-17, in explaining, inter alia, that "[i]f the Hitchcock error is harmless beyond a reasonable doubt, then Jackson's sentence need not be reversed" and that "[a] Hitchcock violation is harmless error if the court can conclude beyond a reasonable doubt that the nonstatutory

- (continued...)

This Court has not previously reversed the Eleventh Circuit Court of Appeals' application of the Skipper/Satterwhite/Chapman standard in either category of cases. See Booker, 111 S.Ct. ___ (denying certiorari); Delap, 110 S.Ct. 2628 (denying certiorari); Tafero, 110 S.Ct. 1834 (denying certiorari); Demps, 110 S.Ct. 1834 (denying certiorari); Clark, 485 U.S. 982 (denying certiorari). And the mitigating evidence in this case is reliable, credible, valid, and "significant" mitigation; it would affect the decision of a reasonable jury; but the jury here was not allowed to consider it. Jackson, 931 F.2d at 717-19.

As in Hitchcock itself, there was mitigation here which the jury should have been allowed to consider, but the jurors were not allowed to "give effect" to the mitigation. See Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989). The mitigating evidence in this case is "significant." Jackson, 931 F.2d at 717-19. The State's efforts to downplay it, we submit, do not undermine the Court of Appeals' reasoned ruling.

D. The State's Efforts To Downplay The Mitigation

The Attorney General does not dispute that Mr. Jackson served in the military for eight years, that he spent three tours of combat duty in VietNam, or that Mr. Jackson was wounded (including a chest wound) during combat duty. These facts alone speak volumes regarding the mitigating nature of Mr. Jackson's

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[9](...continued)
mitigating evidence ... that was not considered ... would not have influenced the jury to recommend a life sentence."

military service, as the Court of Appeals found.[10]

Despite the significant facts reflected by this record, the State attempted before the Court of Appeals, and now attempts, to characterize Mr. Jackson's military service as less than honorable, a gross mischaracterization. The State's argument does not comport with the facts. At the time he left the service, Mr. Jackson received a discharge under honorable conditions. There are five kinds of military discharges, divided into two categories. See Army Regulation (AR) 635-200, Chapter 3. The category of "administrative" discharges includes "honorable," "general under honorable conditions," and "other than honorable" discharges. Id. The category of "punitive" discharges includes "bad conduct" and "dishonorable" discharges. Id.

The criteria for awarding the different kinds of discharges themselves reflect the mitigating nature of Mr. Jackson's military service.

A characterization of under honorable conditions

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[10] As discussed herein, contrary to the State's suggestion (Petition, p. 5), Mr. Jackson was discharged under honorable conditions and was entitled to full military benefits and honors because of his service. Moreover, defense counsel presented evidence relating to Mr. Jackson's military service at sentencing and wanted the jury to consider the evidence. Counsel obviously did not believe that Mr. Jackson's service "would not have helped his case at all" (Petition, p. 5), but rather believed that the sentencers should have been allowed to consider it as a basis for a sentence of life. The sentencers, however, were not allowed to consider it. During post-conviction proceedings, counsel indicated that she did not believe there was a reason to introduce additional evidence about Mr. Jackson's service, an observation which makes sense in light of the fact that she had already introduced "significant" evidence of Mr. Jackson's service, See Jackson, 931 F.2d at 717-19.

> may be issued only when the reason for the soldier's separation specifically allows such characterization.

AR 635-200, Chapter 3-7 ("General Discharge" under honorable conditions). Mr. Jackson received his discharge under honorable conditions only because he earned it: only because Mr. Jackson's case "specifically allow[ed] such characterization." Significantly, Mr. Jackson's discharge was not "under other than honorable conditions," a characterization which requires serious acts of misconduct, see AR 635-200, Chapter 3-7 ("Discharge under other than honorable conditions"), it was a discharge under "honorable conditions."

Moreover, contrary to the State's mischaracterization, Mr. Jackson did not receive any of the "punitive" discharges. These discharges -- "dishonorable" and "bad conduct" -- are given only after a court martial, see AR 635-200, Chapter 3-10, 11, and require involuntary expulsion from the Army. AR 635-200, Chapter 3-13. Mr. Jackson's case is thus strikingly unlike Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989), on which the State relies and in which the Eleventh Circuit Court of Appeals found the sentencing jury's failure to consider the defendant's military background harmless because the defendant was "dishonorabl[y] discharged," 874 F.2d at 1390, never served in combat or overseas, id., had been court-martialed, 874 F.2d at 1390, and in whose case the discharge had been later upgraded because of a "special discharge review program." Id. The State's argument and the Demps case were in fact specifically discussed in the opinion of the Court of Appeals in Mr. Jackson's case (this discussion is quoted below). The Court of Appeals concluded that

the Hitchcock error was harmless in Demps because the lack of quality of Mr. Demps' service would not have influenced a reasonable jury to vote for life; the Court of Appeals concluded that the error was not harmless beyond a reasonable doubt in Mr. Jackson's case because the quality of his military service was "significant" and would influence a reasonable jury. Mr. Jackson received his discharge under honorable conditions at the time of his separation from the Army because he earned it -- the characterization of his discharge was earned on the basis of his service record and was not the result of a special dispensation, as was the case in Demps.

That the quality of Mr. Jackson's service establishes valid mitigation, while the service in Demps did not, is also evident from the differences in benefits available after discharge:

> 3-6. Separation as it affects the soldier
>
> Both the honorable and general discharges entitle a soldier to full Federal rights and benefits provided by law.
>
> * * *
>
> A Dishonorable Discharge deprives the soldier of all veterans benefits and may deprive him or her of civil rights.

AR 635-200, Chapter 3-6 (emphasis added). If Mr. Jackson's service record were as poor as the State contends, Mr. Jackson would not have received a discharge entitling him "to full Federal rights and benefits provided by law."

The State's protestations to the contrary notwithstanding, Mr. Jackson's military service established valid mitigation. The State has never disputed that Mr. Jackson served in the Army for

eight years, spent three tours of duty in combat in VietNam, and was wounded during his VietNam service. The disputes raised by the State were considered and found lacking by the Court of Appeals. And they are contrary to the record.[11] Mr. Jackson's military service established valid mitigation, and the jury's and judge's failure to consider it can not be deemed harmless beyond a reasonable doubt, as the Court of Appeals found:

> We believe that Jackson's military service is in and of itself a significant mitigating circumstance.... The State argues that combat military service alone is not a significant mitigating circumstance and relies on this court's opinion in Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990), to support that position. In Demps, the petitioner alleged that he had produced evidence of military combat duty and argued that this would have influenced the jury to recommend life instead of death. In rejecting that argument, this court stated "that the record reflects no evidence indicating any overseas combat experience." Id. at 1390. Thus, the Demps court concluded that Demps had failed to produce any nonstatutory significant mitigating evidence rather than that military combat service is not a significant mitigating circumstance.
>
> We conclude that Jackson presented significant nonstatutory mitigating evidence that was not considered by the jury or judge because of the Hitchcock violation. We do no hold that military service, regardless of type and duration, is a significant nonstatutory mitigating circumstance. We do hold that Jackson's military service, as reflected by the record in this case, is significant. We cannot say beyond a reasonable doubt that this mitigating evidence would not have affected the jury's

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[11] The few times the State did refer to the record before the Court of Appeals, the State misrepresented what the record actually reflects. For example, the State argued that Dr. Cleo Warner testified "that Jackson's less-than-honorable discharge would cost him some veteran's benefits. (TR 746)" (Answer Brief at 9). In fact, Dr. Warner testified that Mr. Jackson received a "general discharge under honorable conditions," which Dr. Warner believed entitled Mr. Jackson to receive Veteran's benefits (R. 746). Nowhere did Dr. Warner testify that Mr. Jackson had lost any veteran's benefits.

> recommendation. Jackson's military service is a significant circumstance on which reasonable jurors could base a decision to recommend life imprisonment instead of death. We will not speculate about the actual effect of such evidence on a judge or jury. The district court erred by concluding that the error was harmless and by denying relief regarding Jackson's sentence.

Jackson v. Dugger, 931 F.2d at 716-18 (emphasis added).

E. The Analysis of the Court of Appeals

The situation in Mr. Jackson's case parallels the facts on which this Court granted relief in Penry v. Lynaugh, 109 S. Ct. 2934 (1989), which reaffirmed the principles of Lockett v. Ohio, 438 U.S. 586 (1978), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). In Penry, the jury was instructed in accordance with the Texas death penalty statute that it was to determine the sentence on the basis of its answers to three special issues: whether the defendant acted deliberately in committing the murder; whether there was a probability that he would be dangerous in the future; and whether he acted unreasonably in response to provocation. Penry, 109 S. Ct. at 2947. Petitioner Penry argued that the failure to provide the jury with additional instructions precluded the jury from considering the evidence in mitigation. Although the State Respondent in Penry argued that the petitioner was able to argue the significance of his mitigation to the jury, id. at 2950, this Court concluded:

> In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering

> its sentencing decision. Our reasoning in Lockett and Eddings thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 U.S., at 605, 98 S.Ct., at 2965; Eddings, 455 U.S., at 119, 102 S.Ct., at 879 (concurring opinion). "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett, 438 U.S., at 605, 98 S.Ct., at 2965.

Penry, 109 S. Ct. at 2952 (emphasis added).

In Penry, relief was granted because the evidence argued in mitigation could not be fit into the special issues upon which the jury was instructed. Thus, the jury was provided no "vehicle" by which it could "full[y] consider" and "give effect to mitigating evidence relevant to a defendant's character or record...." Penry, 109 S. Ct. at 2951. The same is true in Mr. Jackson's case.

In Hitchcock, as in Penry and as here, defense counsel tried to provide the mitigation to the jury. See Hitchcock, 107 S.Ct. at 1824 ("look at the overall picture ... consider everything together ... consider the whole picture, the whole ball of wax"). In Hitchcock, a case concededly involving the same error as the one in Mr. Jackson's case, this Court unanimously concluded that the error "could not be clearer." 107 S.Ct. at 1824. And in Mr. Jackson's case, a case involving "significant" mitigating evidence, the Court of Appeals could not "confidently conclude" that the error had "no effect" on the sentencers' deliberations. See Skipper v. South Carolina, 476 U.S. at 8.

The Court of Appeals' opinion plainly stated its adherence to this Court's precedents, which it cited and discussed;

related its full review and consideration of the record in this case; and discussed the State's arguments and the reasons why they were insufficient to overcome Mr. Jackson's entitlement to relief. Indeed, the arguments now raised by the State are each rebutted by the Court of Appeals' analysis:

> Jackson contends that his sentencing hearing violated Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), because the jury was instructed to consider only statutorily enumerated mitigating circumstances and because the judge did not consider nonstatutory mitigating circumstances in sentencing Jackson to death. In Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), the Supreme Court held that an advisory jury may not be prohibited from considering relevant nonstatutory mitigating circumstances in making its sentencing recommendation and that the judge must consider relevant nonstatutory mitigating circumstances in determining an appropriate sentence. Id. at 398-99, 107 S.Ct. at 1824. The Court concluded that a jury's and judge's failure to consider such mitigating evidence violates the principles announced in Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), Eddings v. Oklahoma, 455 U.S. 10, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion). Id.
>
> In this case, the State of Florida concedes, and both the Supreme Court of Florida and the district court found, that Jackson's sentencing hearing violated Hitchcock. The trial court's jury instructions were almost identical to those given in Hitchcock. We conclude that the jury, in violation of Hitchcock, was not permitted to consider nonstatutory mitigating circumstances in making its recommendation.
>
> We also conclude that the trial judge did not consider nonstatutory mitigating circumstances in sentencing Jackson. In support of this conclusion we note that the trial judge instructed the jury only to consider statutory mitigating circumstances. A trial court is presumed to follow the instructions given to the jury. See Daugherty v. Dugger, 839 F.2d 1426 (11th Cir.) cert. denied, 488 U.S. 871, 109 S.Ct. 187, 102 L.Ed.2d 156 (1988); Ziegler v. Dugger, 524 So.2d 419 (Fla. 1988). Additionally, the trial court's sentencing order referred to "insufficient mitigating circumstances as enumerated in Subsection (7) of said

Section 921.141 ...." R.S. 13. This was almost identical to the sentencing order in Hitchcock. See Hitchcock, 481 U.S. at 398, 107 S.Ct. at 1824. The sentencing order does not mention nonstatutory mitigating circumstances. Furthermore there were no on-the-record statements by the trial judge indicating that he would consider nonstatutory circumstances. These factors support our conclusion that the trial judge did not consider nonstatutory mitigating circumstances, in violation of Hitchcock.

Although we conclude that a Hitchcock violation occurred, that does not automatically require a reversal of Jackson's sentence. If the Hitchcock error is harmless beyond a reasonable doubt, then Jackson's sentence need not be reversed. Se, e.g., Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990); Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987), cert. denied, 485 U.S. 982, 108 S.Ct. 1282, 99 L.Ed.2d 493 (1988). A Hitchcock violation is harmless error if the court can conclude beyond a reasonable doubt that the nonstatutory mitigating evidence regarding the defendant's character that was not considered by the jury would not have influenced the jury to recommend a life sentence. See Demps v. Dugger, 874 F.2d 1385, 1390 (11th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990). Nonstatutory mitigating evidence not considered by the jury affects the jury's recommendation if it amounts to a significant mitigating circumstance. See Delap v. Dugger, 890 F.2d 285, 306 n.23 (11th Cir. 1989) ("The presence of substantial nonstatutory mitigating evidence in this case ... is sufficient to render the Hitchcock error not harmless beyond a reasonable doubt"), cert. denied, ___ U.S. ___, 110 S.Ct. 2628, 110 L.Ed.2d 648 (1990); Tafero v. Dugger, 873 F.2d 249, 252 n.4 (11th Cir. 1989) (per curiam) (error harmless where "[t]he factors presented by Tafero contain little mitigating value."), cert. denied, ___ U.S. ___, 110 S.Ct. 1834, 108 L.Ed.2d 962 (1990); Jones v. Dugger, 867 F.2d 1277, 1279 (11th Cir. 1989) ("resentencing is not required where the nonstatutory mitigating evidence presented was so insignificant....").

The State of Florida concedes that nonstatutory mitigating evidence was presented to the jury but maintains that this mitigating evidence was so insignificant that even if the jury could have considered it, they would not have been affected by it and the sentence recommendation would have been the same. Therefore, the State argues, the Hitchcock error was harmless beyond a reasonable doubt. This was the position taken by the Supreme Court of Florida when it

reviewed Jackson's Hitchcock claim. See Jackson v. Dugger, 529 So.2d 1081, 1082 (Fla. 1989). The court stated that "[v]iewed in its best light, the nonstatutory mitigating evidence was minimal. We are convinced beyond a reasonable doubt that even with the proper jury instruction, the jury would not have made a recommendation of life imprisonment for this double murder." Id.

The State of Florida argues that this court is bound by the supreme court's determination that the error was harmless. We reject that argument. "The ultimate determination of whether federal constitutional error is harmless is a federal question" and therefore federal courts are not bound by state court determinations of what constitutes harmless error. Grizzell v. Wainwright, 692 F.2d 722, 725 (11th Cir. 1982), cert. denied, 461 U.S. 948, 103 S.Ct. 2129, 77 L.Ed.2d 1307 (1983). See also Booker v. Dugger, 922 F.2d 633, 636 n.4 (11th Cir. 1991).

Jackson asserts that he produced significant evidence of nonstatutory mitigating circumstances. He points to evidence that he had served in the military for eight years; he served overseas, including three tours of combat duty in Vietnam; he was wounded in the chest while in n Vietnam; he was a religious person; he had no history of prior violence; he had attempted to go to college; and he was amenable to incarceration.

After reviewing the transcript of the sentencing hearing, we conclude that Jackson's military service is a significant nonstatutory mitigating circumstances that the jury was not allowed to consider. A psychologist, who interviewed Jackson, testified that, "I believe he [Jackson] told me he was in the army for eight years.... He said that he was in Vietnam three times and on each of those occasions he was in a combat situation for [a] fairly lengthy period of time." Sentencing Transcript at 741-42.

We believe that Jackson's military service is in and of itself a significant mitigating circumstance. We therefore need not decide whether the other evidence presented by Jackson was significant. The State argues that combat military service alone is not a significant mitigating circumstance and relies on this court's opinion in Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990), to support that position. In Demps, the petitioner alleged that he had produced evidence of military combat duty and argued that this would have influenced the jury to recommend life instead of death. In rejecting that argument, this

> court stated "that the record reflects no evidence indicating any overseas combat experience." Id. at 1390. Thus, the Demps court concluded that Demps had failed to produce any nonstatutory significant mitigating evidence rather than that military combat service is not a significant mitigating circumstance.
>
> We conclude that Jackson presented significant nonstatutory mitigating evidence that was not considered by the jury or judge because of the Hitchcock violation. We do not hold that military service, regardless of type and duration, is a significant nonstatutory mitigating circumstance. We do hold that Jackson's military service, as reflected by the record in this case, is significant. We cannot say beyond a reasonable doubt that this mitigating evidence would not have affected the jury's recommendation. Jackson's military service is a significant circumstance on which reasonable jurors could base a decision to recommend life imprisonment instead of death. We will not speculate about the actual effect of such evidence on a judge or jury. The district court erred by concluding that the error was harmless and by denying relief regarding Jackson's sentence.

Jackson v. Dugger, 931 F.2d 712, 716-18 (11th Cir. 1991) (footnote omitted).

ARGUMENT IN RESPONSE

In light of the discussion presented above, the State's arguments in support of its petition for writ of certiorari do not overcome the propriety of the Eleventh Circuit's ruling and do not state a ground sufficient to warrant certiorari review. The Court of Appeals carefully considered and applied this Court's settled precedents. It did not overlook any of the relevant facts. It fully addressed each of the arguments which the State presented. And it thoughtfully applied this Court's law to the undisputed facts and circumstances of this case.

The Attorney General's petition expresses the State's displeasure at the Court of Appeals' ruling, but that displeasure

surely does not support a grant of the State's certiorari petition. The State's specific arguments are addressed below.

(I)

The State first asserts that "certiorari should be granted to decide the standard to be applied in determining the harmlessness of [a] violation of Hitchcock v. Dugger" (Petition, p. 6). Hitchcock error, like the errors at issue in Lockett, Eddings, Penry, and Skipper, is the eighth amendment error resulting from a restriction on the sentencers' consideration of relevant evidence in mitigation of a death sentence. As discussed above, this Court has expressly held that the eighth amendment standard to be applied to capital sentencing error is one of harmlessness beyond a reasonable doubt. See Satterwhite v. Texas (discussed above). In the context of a restriction of the sentencers' consideration of mitigation, this Court explained in Skipper that relief was warranted because the Court could not "confidently conclude" that the error had no effect on the jury's deliberations.

This standard -- of harmlessness beyond a reasonable doubt -- is the one which the Court of Appeals expressly applied to the undisputed error, involving a prohibition on the consideration of relevant mitigation, which occurred during the proceedings resulting in Carl Jackson's sentence of death. See Jackson, 931 F.2d at 716-18. As discussed above, the Court of Appeals has consistently applied the standard, finding that in some cases that the error is harmless beyond a reasonable doubt, e.g., Demps; Tafero; Clark (discussed above), and in others that

it is not. Delap; Booker (discussed above).[12] This Court has disturbed none of these rulings of the Court of Appeals.[13]

Contrary to the State's suggestion, there is a "standard of 'harmless error' review ... recognized to guide the federal courts during [section] 2254 proceedings" in cases involving a restriction on the sentencers' consideration of relevant mitigating factors. The standard is the one which the Court of Appeals for the Eleventh Circuit has consistently applied in such cases, and the one which it applied in this case. See Jackson, 931 F.2d at 717-18.[14]

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[12] The Attorney General's statement that "[i]n other cases, the Eleventh Circuit rejected any claim of 'harmless error' without discussion or analysis" (Petition, p. 6), is somewhat misleading. As the Court of Appeals' opinions in the cases listed by the petition in support of this proposition show, see, e.g., Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987) (in banc), cert. denied, 489 U.S. 1071 (1989), these cases did not involve an argument by the State that the error was harmless, but, as in Hitchcock itself, involved arguments that there was no error or, as in Hargrave, arguments premised on an alleged procedural bar. As in Hitchcock itself, because the State presented no harmless error argument in these cases, the reviewing court found that there was no reason to undertake an analysis of harmless error issues.

[13] In this regard, as noted above, Respondent notes that this Court recently denied the State's certiorari petition in Singletary v. Booker, Case No. 90-1778, 111 S.Ct. ___ (1991), a petition on which the State relied in its application for certiorari review in this case.

[14] Notwithstanding the State's suggestion (Petition, p. 7), there exists no "intracircuit conflict" in the Eleventh Circuit in cases, such as Mr. Jackson's, involving a restriction on the jury's consideration of "significant" mitigating evidence. Although panels of the Eleventh Circuit have discussed the potential difficulties in properly applying the "harmless beyond a reasonable doubt standard" in those cases involving weak, unreliable, or insubstantial mitigation -- difficulties akin to the ones which this Court spoke to in Satterwhite, because of the discretion that is afforded capital sentencers -- the Court of Appeals has consistently noted that there is no difficulty in

(continued...)

(II)

The State also writes that "certiorari should be granted pursuant to the supervisory power of this Court to create and enforce a consistent standard of review and to enforce the standards set down by this Court in Anderson v. Bessemer City[, 470 U.S. 504 (1985).]" (Petition, p. 8). In support of this contention the State argues, without explanation or citation, that the Eleventh Circuit granted relief "without reference to any evidence relied upon by the district court" (Petition, p. 8). The District Court, however, neither conducted a hearing nor made findings of fact. No evidence "relied on" by the District Court which the Court of Appeals ignored is discussed in the State's petition and no factual findings of the District Court which were overlooked by the Court of Appeals are listed. The District Court made no findings of fact adverse to Mr. Jackson; did not contest the existence, reliability, relevancy, and veracity of the mitigating evidence; and as the District Court's general ruling reflects (see Petitioner's App. A-47), the Court did not base its decision on a finding of fact.

Similarly, the State provides no support for its assertions that the Court of Appeals "engaged in appellate trial de novo" and that it ignored "all prior proceedings" (Petition, p. 8). The Court of Appeals undertook a careful examination of the

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[14](...continued)
cases such as Mr. Jackson's, involving "significant" mitigation which would affect a reasonable sentencer but which the sentencer is not allowed to consider. It is also noteworthy that in cases involving weak, unreliable, or insubstantial mitigation, the Court of Appeals has found the errors harmless. See, e.g., Tafero; Demps.

record, including the record of the proceedings "actually conducted," cf. Hitchcock; considered the State's arguments;[15] and only thereafter concluded that based on the record of these proceedings "Jackson presented significant nonstatutory mitigating evidence that was not considered by the jury or judge because of the Hitchcock violation" and that the error could not be found harmless beyond a reasonable doubt in this case. Jackson, 931 F.2d at 717-18.

The State's concluding argument in this subsection -- that District Court rulings as to whether a federal constitutional error is harmless beyond a reasonable doubt should be subjected to a "clearly erroneous" standard of review in the Court of Appeals -- requires no elaborate response. The "clearly erroneous" standard of review applies to findings of fact, not conclusions of law, as the Court of Appeals discussed in rejecting the State's argument, Jackson, 931 F.2d at 717, and as this Court has explained on a number of occasions. See Introduction and Statement of the Case, supra (discussing Townsend v. Sain, Miller v. Fenton, and other decisions). See also Brewer v. Williams, 430 U.S. 387 (1977) (questions of federal constitutional law are subject to independent review); Cuyler v. Sullivan, 446 U.S. 335 (1980) (same); Grizzell v. Wainwright, 692 F.2d 722, 725 (11th Cir. 1982) (same), cert. denied, 461 U.S. 948 (1983); Booker v. Dugger, 922 F.2d 633, 636

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[15] Indeed, the Court provided a recitation of why Mr. Jackson's service was of significance in its mitigating value while the military service in Demps v. Dugger was not, Jackson, 931 F.2d at 717, and carefully considered and accounted for each of the State's other arguments. Id.

n.4 (11th Cir. 1991) (same, as to the error resulting from the restriction on the jury's consideration of mitigating evidence), cert. denied sub nom. Singletary v. Booker, 111 S.Ct. ___ (1991).

(III)

The State's final argument is that "certiorari should be granted to resolve the recurring conflict over whether state court findings of harmless error, reviewed federally pursuant to 28 U.S.C. §2254, are entitled to the same deference as federal district court findings of harmless error reviewed pursuant to 28 U.S.C. § 2255 ...." (Petition, p. 10). The State presents no cases even remotely on point for its proposition that different review is afforded by the federal courts to cases arising under 28 U.S.C. section 2254 than the review afforded to cases under section 2255. Rather, as even the cases on which the State relies explain:

> [T]he procedural devices provided to make an evidentiary hearing unnecessary are nearly identical in the rules pursuant to [section] 2254 and [section] 2255 respectively.

Farrow v. United States, 580 F.2d 1339, 1353 (9th Cir. 1978).

The State further argues, as it did before the Court of Appeals, that deference was due to the Florida Supreme Court's ruling of harmless error. The Court of Appeals expressly rejected this argument. See Jackson, 931 F.2d at 717 ("'[T]he ultimate determination of whether federal constitutional error is harmless is a federal question' and therefore federal courts are not bound by state court determinations of what constitutes harmless error.")

Florida law ascribes the capital sentencing decision

strictly to the jury and judge. The jury and judge here were restricted in the consideration of "significant" mitigating evidence. No sentencing body has ever considered the significant evidence in mitigation in this case. The Florida Supreme Court has held that it does not engage in appellate resentencing and does not reweigh evidence of aggravating and mitigating circumstances when it reviews capital cases. See Hudson v. State, 538 S.2d 829, 831 (Fla. 1989); Brown v. Wainwright, 392 So.2d 1327, 1331-32 (Fla. 1981); see also Parker v. Dugger, 111 S.Ct. 731, 738 (1991) ("[T]he Florida Supreme Court has made it clear on several occasions that it does not reweigh the evidence of aggravating and mitigating circumstances.") When it ruled in Mr. Jackson's case, the Florida Supreme Court neither reweighed the aggravating and mitigating circumstances nor engaged in appellate resentencing. Here, as in Booker, "[t]aken as a whole, the Florida Supreme Court's opinion demonstrates that the court only intended to undertake harmless error analysis of the Hitchcock error -- an analysis that the court conducts in its capacity as a pure reviewing court under ... Chapman v. California." Booker v. Dugger, 922 F.2d at 645 (Tjoflat, C.J., concurring), cert. denied sub nom Singletary v. Booker, 111 S.Ct. ___ (1991).

Although "state court findings of fact are entitled to deference in the federal courts" (Petition, p.-13), this case involves no overlooked state court findings of fact. There is no question about the veracity of Mr. Jackson's military service and there is no question that the sentencers (the jury and judge)

never considered it. The question of whether a federal constitutional error is harmless is a federal question. The Attorney General overlooks this settled standard of federal review. Because the State overlooks it, its arguments have no application to this case.

CONCLUSION

Neither a substantial nor a debatable question is presented by the State's petition, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Mark Menser, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, this 22nd day of October, 1991.

Attorney

BY THE COURT:

Appellees' motion to withdraw the petition for rehearing and suggestion for rehearing en banc is GRANTED. As the case has settled, the opinion at 922 F.2d 712 is vacated, the judgment of the district court is vacated and the case is remanded to the district court with direction that the case be dismissed.

Carl JACKSON, Petitioner-Appellant,

v.

Richard L. DUGGER, Secretary, Florida Department of Corrections, Respondent-Appellee.

No. 90-3237.

United States Court of Appeals, Eleventh Circuit.

April 29, 1991.

Following affirmance, 359 So.2d 1190, of convictions of robbery, kidnapping and two counts of first-degree murder and sentence of death, petitioner sought writ of habeas corpus. The United States District Court for the Northern District of Florida, No. 90-50069, C. Roger Vinson, J., denied relief and petitioner appealed. The Court of Appeals, Cox, Circuit Judge, held that: (1) petitioner was not denied effective assistance of counsel, and (2) trial court erred in instructing jury to consider only statutorily enumerated mitigating circumstances and in failing to consider nonstatutory mitigating circumstances.

Affirmed in part, reversed and remanded in part.

1. Criminal Law ⇐641.13(7)

Where matters complained of were not preserved for review on appeal, appellate counsel was procedurally barred from raising them on direct appeal, and therefore was not deficient in failing to attempt to do so. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐1030(1)

Under Florida law, failure of trial counsel to object at trial bars appellate review unless error constitutes "fundamental error."

3. Criminal Law ⇐796

State trial court erred in instructing jury to consider only statutorily enumerated mitigating circumstances and in failing to consider nonstatutory mitigating circumstances in sentencing defendant in capital case.

4. Criminal Law ⇐1172.9

Instruction allowing jury to only consider statutory mitigating circumstances is harmless error if court can conclude beyond a reasonable doubt that nonstatutory mitigating evidence regarding defendant's character that was not considered by the jury would not have influenced jury to recommend life sentence; nonstatutory mitigating evidence not considered by jury affects jury's recommendation if it amounts to significant mitigating circumstances.

5. Habeas Corpus ⇐452, 770

Ultimate determination of whether federal constitutional error is harmless is a federal question, and federal courts are not bound by state court determinations of what constitutes "harmless error."

6. Criminal Law ⇐796, 1172.9

Instruction that jury could not consider nonstatutory mitigating circumstances in recommending sentence in capital case was not harmless; defendant's military service was a significant nonstatutory mitigating circumstance.

Billy H. Nolas, Gail Anderson, Julie D. Naylor, Tallahassee, Fla., for petitioner-appellant.

Mark Menser, Asst. Atty. Gen., Dept. of Legal Affairs, Tallahassee, Fla., for respondent-appellee.

Appeal from the United States District Court for the Northern District of Florida.

Before JOHNSON, EDMONDSON and COX, Circuit Judges.

COX, Circuit Judge:

On April 20, 1975, Carl Jackson robbed a convenience store and murdered the clerk, Ann Butler. In the process of leaving, Jackson kidnapped Mary Price and later murdered her. He was convicted in a Florida court of robbery, kidnapping and two counts of first-degree murder. He was sentenced to death for the murders. He ultimately attacked his convictions and death sentence by a 28 U.S.C. § 2254 petition filed in the Northern District of Florida. The district court denied relief and Jackson appeals. We affirm the district court's denial of relief as to Jackson's convictions, but reverse the district court's denial of relief relative to his death sentence.

I. FACTS AND PROCEDURAL HISTORY [1]

On the morning of April 20, 1975, Carl Jackson persuaded Jimmy Harris, a friend, to drive Jackson to a Jr. Food Store in Bay County, Florida. Once Jackson went into the store, Harris, not wanting to become further involved, drove away leaving Jackson stranded. Jackson proceeded to rob the store. During the robbery he shot and killed Ann Butler, the store clerk on duty. While Jackson was committing the robbery, Mr. and Mrs. Price, on their way to Sunday church services, stopped at the store. Mr. Price went into the store, leaving his car keys in the ignition and Mrs. Price in the car. Jackson, unseen by Mr. Price, exited the store and, realizing that Harris had left him stranded, commandeered the Prices' car with Mrs. Price in it. Mr. Price found the items he wanted and went to the counter to pay for them. At the counter he found Mrs. Butler lying on the floor dead. After calling the police Mr. Price noticed that Mrs. Price and the car were gone.

Jackson drove the Prices' car a short distance to a secluded area. Once there, he shot and killed Mrs. Price. Jackson then abandoned the car. Although there was no direct evidence that Jackson committed these acts, there was overwhelming circumstantial evidence including one of Jackson's fingerprints in the Prices' car, his bloody jacket near the car, and the testimony of Jimmy Harris.

After an investigation, Jackson was indicted and tried for the murders of Mrs. Butler and Mrs. Price, the kidnapping of Mrs. Price and the robbery of the Jr. Food Store. The jury found Jackson guilty on all four counts. A sentencing hearing was held to determine whether Jackson should be sentenced to death or life imprisonment for the murders.[2] Under Florida law, both aggravating and mitigating circumstances could be presented at the hearing. The State, relying on the evidence produced at trial to establish several aggravating circumstances, produced no additional evidence. The defense introduced the testimony of four witnesses. Part of that testimony indicated that Jackson had served eight years in the military, including three tours of combat duty in Vietnam.

The jury, by a vote of 11-1, recommended that Jackson be sentenced to death. The trial judge, after finding five aggravating [3] and no statutory mitigating circumstances, sentenced Jackson to death. Jackson appealed to the Supreme Court of Florida. The supreme court, after striking

1. This statement of the facts is based upon the Supreme Court of Florida's summary of the evidence at trial. *Jackson v. State*, 359 So.2d 1190 (Fla.1978), *cert. denied*, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979).

2. Jackson was sentenced to life imprisonment on the robbery charge and fifteen years imprisonment on the kidnapping charge.

3. The five aggravating circumstances found by the court were: (1) the murder of Ann Butler was committed during the course of a robbery; (2) the murder of Ann Butler was committed for pecuniary gain; (3) the murder of Mary Price was committed while Jackson was fleeing after the robbery; (4) the murder of Mary Price was committed during a kidnapping; and (5) the two murders were committed to avoid a lawful arrest.

one of the aggravating circumstances,[4] affirmed his convictions and sentence, *Jackson v. State*, 359 So.2d 1190 (Fla.1978), *cert. denied*, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979), and the United States Supreme Court denied certiorari. *Jackson v. Florida*, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979).

Jackson then filed a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850. The trial court rejected all of Jackson's claims and the Supreme Court of Florida affirmed that ruling. *Jackson v. State*, 437 So.2d 147 (Fla.1983), *cert. denied*, 465 U.S. 1013, 104 S.Ct. 1016, 79 L.Ed.2d 246 (1984). After a death warrant was signed, Jackson filed a second Rule 3.850 motion. Additionally, Jackson filed a petition for a writ of habeas corpus in the Supreme Court of Florida. The trial court again rejected Jackson's Rule 3.850 claims. The supreme court affirmed the trial court's ruling and also denied Jackson's petition for habeas corpus relief. *Jackson v. State*, 452 So.2d 533 (Fla.1984).

In June 1984, Ella Mae Wilson filed, on Jackson's behalf, a "next friend" petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court, after initially staying the petition, dismissed it without prejudice to allow Jackson to exhaust his state remedies regarding the claim that his sentencing hearing violated *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

Thereafter, Jackson filed a second petition for a writ of habeas corpus in the Supreme Court of Florida alleging that his sentencing hearing violated *Hitchcock*. The supreme court determined that Jackson's sentencing hearing violated *Hitchcock* because the trial court's instructions precluded the jury from considering nonstatutory mitigating circumstances in determining Jackson's sentence. The court, however, concluded that any error that resulted from such a violation was harmless beyond a reasonable doubt because the nonstatutory mitigating evidence was "minimal." *Jackson v. Dugger*, 529 So.2d 1081, 1082 (Fla.1988).

In July 1989, Jackson filed a third petition for a writ of habeas corpus in the Supreme Court of Florida alleging five claims. The supreme court denied the petition without opinion. *Jackson v. Dugger*, 554 So.2d 1168 (Fla.1989), *cert. denied*, — U.S. —, 110 S.Ct. 3294, 111 L.Ed.2d 803 (1990).

Jackson then filed this petition for a writ of habeas corpus in the Northern District of Florida alleging seventeen claims.[5] The

4. The aggravating circumstance struck by the supreme court was that the murder of Mrs. Butler was committed for pecuniary gain.

5. Jackson's petition raised seventeen claims. We will number the claims as did Jackson's petition. Six of Jackson's claims sought to overturn his convictions: (7) a claim that he received ineffective assistance of counsel during the guilt/innocence phase of his trial; (8) a claim that he received ineffective assistance of counsel on direct appeal; (14) a claim that jurors were dismissed in violation of the principles announced in *Witherspoon v. Illinois;* (15) a claim of improper argument by the prosecution during the guilt phase of the trial; (16) a claim that admission of testimony to the effect that Jackson requested an attorney during a custodial interrogation, and the prosecutor's comment on Jackson being provided an attorney after his arrest, violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments; and (17) a claim that photographic evidence was improperly admitted at trial.

The remaining eleven of Jackson's claims challenged his death sentence: (1) a claim that he was sentenced in violation of the principle stated in *Hitchcock v. Dugger*; (2) a claim that there was an improper argument by the prosecutor during the sentencing phase of the trial which created a "presumption of death"; (3) a *Booth v. Maryland* claim; (4) a claim that the trial court erred by not finding the mitigating circumstance of "no significant criminal history"; (5) a claim that he received ineffective assistance of counsel during the sentencing phase of the trial; (6) a second *Hitchcock v. Dugger* claim (*Hitchcock* error restricted defense counsel's efforts); (9) a claim that the trial court failed to provide a factual basis for imposition of the death penalty; (10) a claim that the Supreme Court of Florida erred by not ordering a new sentencing hearing after striking one aggravating circumstance; (11) a claim that the trial court misapplied (doubled) aggravating circumstances in sentencing Jackson; (12) a claim that the avoiding arrest aggravating circumstance was misapplied; and (13) a claim that the jury was misinstructed on the number of votes required to recommend life imprisonment.

district court determined that Jackson's sentencing was in violation of the principle announced in *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). The district court considered the harmless error issue a "very close question," but concluded that the *Hitchcock* violation was harmless beyond a reasonable doubt. (R.4–5). The court then determined that none of the remaining claims were "sufficiently meritorious to warrant issuance of the writ." *Id.* The court, however, issued a certificate of probable cause to appeal, specifically focusing on the claim that Jackson's sentencing hearing violated *Hitchcock*. Jackson now appeals the district court's denial of relief on eight of his seventeen claims.[6]

II. DISCUSSION

A. Claims Relating to Conviction

Jackson appeals the denial of relief on only one claim that relates to his convictions. It is the claim that he was denied effective assistance of counsel on direct appeal in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Claims of ineffective assistance of counsel are governed by the standard announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "First, the defendant must show that counsel's performance was deficient.... Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687, 104 S.Ct. at 2064. The defendant must satisfy both parts of this standard to be entitled to relief.

Jackson argues that his appellate counsel was deficient in failing to raise two issues on direct appeal that would have resulted in the reversal of his convictions. First, he argues that his appellate counsel was deficient in failing to assert on direct appeal that potential jurors were dismissed by the trial court in violation of the principles announced in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). When presented with an identical claim, the Supreme Court of Florida found that this issue was not preserved for appellate review because no objection to dismissal of these jurors was asserted in the trial court. *Jackson v. State*, 452 So.2d 533, 536 (Fla.1984).

[1, 2] Jackson also argues that appellate counsel was deficient in failing to assign as error prejudicial closing arguments made by the State during the guilt/innocence phase of the trial. The record in this case does not include a transcript of the guilt/innocence phase of the trial, but Jackson's petition includes excerpts from the transcript which set forth the arguments complained of. These excerpts do not reflect any objection on the part of trial counsel to the arguments in question. Additionally, Jackson, in another part of his petition, specifically asserts that counsel failed to object to these arguments. R.1–4–157, 158. Under Florida law, failure to assert appropriate objections at trial bars review on appeal.[7] *Wilson v. State*, 436 So.2d 908, 910 (Fla.1983); *State v. Cumbie*, 380 So.2d 1031, 1033 (Fla.1980); *Clark v. State*, 363 So.2d 331, 333 (Fla.1978).

Since the matters complained of in this case were not preserved for review on appeal, appellate counsel was procedurally barred from raising them on direct appeal and therefore was not deficient in failing to attempt to do so. *Bertolotti v. Dugger*, 883 F.2d 1503, 1523 (11th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 3296, 111 L.Ed.2d 804 (1990). Because Jackson has failed to show that appellate counsel was deficient, the district court properly denied relief on the claim that he received ineffective assistance of counsel on direct appeal.

6. Jackson appeals the district court's denial of relief on only one claim that relates to his convictions—claim (8). He also appeals the denial of relief on seven claims that challenge his death sentence: claims (1), (2), (3), (5), (9), (10) and (12).

7. The general rule under Florida law is that failure of trial counsel to object at trial bars appellate review. The sole exception to this rule is when the error constitutes "fundamental error." *Clark v. State*, 363 So.2d 331, 333 (Fla. 1978). Jackson does not either in his petition or brief on appeal contend that the arguments complained of presented "fundamental error."

B. Claims Relating to Sentence

i. *Hitchcock Claim*

[3] Jackson contends that his sentencing hearing violated *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), because the jury was instructed to consider only statutorily enumerated mitigating circumstances and because the judge did not consider nonstatutory mitigating circumstances in sentencing Jackson to death. In *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), the Supreme Court held that an advisory jury may not be prohibited from considering relevant nonstatutory mitigating circumstances in making its sentencing recommendation and that the judge must consider relevant nonstatutory mitigating circumstances in determining an appropriate sentence. *Id.* at 398–99, 107 S.Ct. at 1824. The Court concluded that a jury's and judge's failure to consider such mitigating evidence violates the principles announced in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion). *Id.*

In this case, the State of Florida concedes, and both the Supreme Court of Florida and the district court found, that Jackson's sentencing hearing violated *Hitchcock*. The trial court's jury instructions were almost identical to those given in *Hitchcock*.[8] We conclude that the jury, in violation of *Hitchcock*, was not permitted to consider nonstatutory mitigating circumstances in making its recommendation.

We also conclude that the trial judge did not consider nonstatutory mitigating circumstances in sentencing Jackson. In support of this conclusion we note that the trial judge instructed the jury only to consider statutory mitigating circumstances. A trial court is presumed to follow the instructions given to the jury. *See Daugherty v. Dugger*, 839 F.2d 1426 (11th Cir.), *cert. denied*, 488 U.S. 871, 109 S.Ct. 187, 102 L.Ed.2d 156 (1988); *Zeigler v. Dugger*, 524 So.2d 419 (Fla.1988). Additionally, the trial court's sentencing order referred to "insufficient mitigating circumstances as enumerated in Subsection (7) of said Section 921.141...." R.S. 13. This was almost identical to the sentencing order in *Hitchcock*. *See Hitchcock*, 481 U.S. at 398, 107 S.Ct. at 1824. The sentencing order does not mention nonstatutory mitigating circumstances. Furthermore there were no on-the-record statements by the trial judge indicating that he would consider nonstatutory circumstances. These factors support our conclusion that the trial judge did not consider nonstatutory mitigating circumstances, in violation of *Hitchcock*.

[4] Although we conclude that a *Hitchcock* violation occurred, that does not automatically require a reversal of Jackson's sentence. If the *Hitchcock* error is harmless beyond a reasonable doubt, then Jackson's sentence need not be reversed. *See, e.g., Demps v. Dugger*, 874 F.2d 1385 (11th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990); *Clark v. Dugger*, 834 F.2d 1561 (11th Cir.1987), *cert. denied*, 485 U.S. 982, 108 S.Ct. 1282, 99 L.Ed.2d 493 (1988). A *Hitchcock* violation is harmless error if the court can conclude beyond a reasonable doubt that the nonstatutory mitigating evidence regarding the defendant's character that was not considered by the jury would not have influenced the jury to recommend a life sentence. *See Demps v. Dugger*, 874 F.2d 1385, 1390 (11th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990). Nonstatutory mitigating evidence not considered by the jury affects the jury's recommendation if it amounts to a significant mitigating circumstance. *See Delap v. Dugger*, 890 F.2d 285, 306 n. 23 (11th Cir.1989) ("The presence of substantial nonstatutory mitigating evidence in

8. In *Hitchcock*, the trial judge instructed the jury that "[t]he mitigating circumstances which you may consider shall be the following...." The court then read the statutory mitigating factors set out in Fla.Stat. § 921.141(6). *See Hitchcock*, 481 U.S. at 398, 107 S.Ct. at 1824. The trial court at Jackson's sentencing hearing instructed the jury "[t]he mitigating circumstances which you may consider, if established by the evidence, are these: [Listing statutory mitigating factors]." Transcript of sentencing hearing at 795–96.

...a case ... is sufficient to render the *...itchcock* error not harmless beyond a rea...onable doubt"), *cert. denied*, — U.S. —, 110 S.Ct. 2628, 110 L.Ed.2d 648 (1990); *Tafero v. Dugger*, 873 F.2d 249, 252 n. 4 (11th Cir.1989) (per curiam) (error harmless where "[t]he factors presented by Tafero contain little mitigating value."), *cert. denied*, — U.S. —, 110 S.Ct. 1834, 108 L.Ed.2d 962 (1990); *Jones v. Dugger*, 867 F.2d 1277, 1279 (11th Cir.1989) ("resentencing is not required where the nonstatutory mitigating evidence presented was so insignificant....").

The State of Florida concedes that nonstatutory mitigating evidence was presented to the jury but maintains that this mitigating evidence was so insignificant that even if the jury could have considered it, they would not have been affected by it and the sentence recommendation would have been the same. Therefore, the State argues, the *Hitchcock* error was harmless beyond a reasonable doubt. This was the position taken by the Supreme Court of Florida when it reviewed Jackson's *Hitchcock* claim. *See Jackson v. Dugger*, 529 So.2d 1081, 1082 (Fla.1988). The court stated that "[v]iewed in its best light, the nonstatutory mitigating evidence was minimal. We are convinced beyond a reasonable doubt that even with the proper jury instruction, the jury would not have made a recommendation of life imprisonment for this double murder." *Id.*

[5] The State of Florida argues that this court is bound by the supreme court's determination that the error was harmless. We reject that argument. "The ultimate determination of whether federal constitutional error is harmless is a federal question" and therefore federal courts are not bound by state court determinations of what constitutes harmless error. *Grizzell v. Wainwright*, 692 F.2d 722, 725 (11th Cir.1982), *cert. denied*, 461 U.S. 948, 103 S.Ct. 2129, 77 L.Ed.2d 1307 (1983). *See also Booker v. Dugger*, 922 F.2d 633, 636 n. 4 (11th Cir.1991).

[6] Jackson asserts that he produced significant evidence of nonstatutory mitigating circumstances. He points to evidence that he had served in the military for eight years; he served overseas, including three tours of combat duty in Vietnam; he was wounded in the chest while in Vietnam; he was a religious person; he had no history of prior violence; he had attempted to go to college; and he was amenable to incarceration.

After reviewing the transcript of the sentencing hearing, we conclude that Jackson's military service is a significant nonstatutory mitigating circumstance that the jury was not allowed to consider. A psychologist, who interviewed Jackson, testified that, "I believe he [Jackson] told me he was in the army for eight years.... He said that he was in Vietnam three times and on each of those occasions he was in a combat situation for [a] fairly lengthy period of time." Sentencing Transcript at 741–42.

We believe that Jackson's military service is in and of itself a significant mitigating circumstance. We therefore need not decide whether the other evidence presented by Jackson was significant. The State argues that combat military service alone is not a significant mitigating circumstance and relies on this court's opinion in *Demps v. Dugger*, 874 F.2d 1385 (11th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990), to support that position. In *Demps*, the petitioner alleged that he had produced evidence of military combat duty and argued that this would have influenced the jury to recommend life instead of death. In rejecting that argument, this court stated "that the record reflects no evidence indicating any overseas combat experience." *Id.* at 1390. Thus, the *Demps* court concluded that Demps had failed to produce any nonstatutory significant mitigating evidence rather than that military combat service is not a significant mitigating circumstance.

We conclude that Jackson presented significant nonstatutory mitigating evidence that was not considered by the jury or judge because of the *Hitchcock* violation. We do not hold that military service, regardless of type and duration, is a significant nonstatutory mitigating circumstance.

We do hold that Jackson's military service, as reflected by the record in this case, is significant. We cannot say beyond a reasonable doubt that this mitigating evidence would not have affected the jury's recommendation. Jackson's military service is a significant circumstance on which reasonable jurors could base a decision to recommend life imprisonment instead of death. We will not speculate about the actual effect of such evidence on a judge or jury. The district court erred by concluding that the error was harmless and by denying relief regarding Jackson's sentence.

ii. *Other Claims Relating to Sentence*

Jackson also appeals the denial of relief on six other claims that challenge his death sentence. Because we hold that he is entitled to a new sentencing hearing, we do not address these claims.

III. CONCLUSION

We AFFIRM the district court's order denying relief regarding Jackson's convictions. We conclude that Jackson's sentencing hearing violated *Hitchcock v. Dugger* and that the error was not harmless beyond a reasonable doubt. We therefore REVERSE the district court's order denying relief regarding Jackson's sentence and REMAND to the district court with instructions to enter an order granting the petition for a writ of habeas corpus unless the State of Florida, within a reasonable time, either: (a) affords Jackson a new sentencing hearing and resentences Jackson in a proceeding that is consistent with the requirements of *Hitchcock*; or (b) vacates the death sentence and imposes a lesser sentence consistent with law.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Michael SOFARELLI, Plaintiff–Appellant,

v.

PINELLAS COUNTY, Pinellas County Sheriff Dept., Norman Hibbing, Alfred Swetay, Jeffrey S. Harman, Edward D. Carlson, Jr., Marytherese Bancroft, Defendants–Appellees.

Norman HIBBING, Marytherese Bancroft, Edward D. Carlson, Jr., Jeffrey Harman, Alfred Swetay, Plaintiffs–Counter–Defendants, Appellees,

v.

Michael SOFARELLI, Defendant–Counter–Claimant, Appellant.

Nos. 90–3274, 90–3281.

United States Court of Appeals, Eleventh Circuit.

April 29, 1991.

Property owner brought state court action to enjoin house owner from moving house into neighborhood. Neighbors intervened in case. House owner filed counter-claims alleging violations of Fair Housing Act and § 1983 and removed case. House owner then brought action under § 1983 and Fair Housing Act against neighbors, county, and sheriff's department to enjoin interference with move. The United States District Court for the Middle District of Florida, No. 89–1311–CIV-T–17B, 733 F.Supp. 1470, Elizabeth A. Kovachevich, J., remanded removed case to state court and dismissed house owner's claims. House owner appealed. The Court of Appeals, Anderson, Circuit Judge, held that: (1) house owner had claim against neighbors under Fair Housing Act; (2) sheriff complied with substantive due process; and (3) removal of case was proper.

Affirmed in part, vacated in part, and remanded.